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No. 83-5849

IN THE

SUPREME COURT OF THE UNITED STATES

HOYT FRANKLIN CLINES,
JAMES WILLIAM HOLMES,
DARRYL V. RICHLEY and
MICHAEL RAY ORNDORFF

PETITIONERS,

V.

STATE OF ARKANSAS

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED FOR REVIEW

I.

THE DENIAL OF SEVERANCE VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

II.

THE ARKANSAS CAPITAL FELONY MURDER STATUTE AS APPLIED TO PETITIONERS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

III.

THE USE OF A DEATH QUALIFIED JURY TO DECIDE THE GUILT AND PUNISHMENT OF PETITIONERS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

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The Petitioners, Hoyt Franklin Clines, James William Holmes, Darryl V. Richley and Michael Ray Orndorff, by their attorneys, Donald R. Huffman, Marshall N. Carlisle, Matt Horan, and Priscilla Karen Pope, respectively, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas entered on 3 October, 1983.

OPINION BELOW

The Supreme Court of the State of Arkansas entered its decision affirming the convictions and sentences of Petitioners by the Circuit Court, Benton County Circuit, 19th Judicial District, CR 81-20, on July 5, 1983. A copy of the Opinion, Supreme Court of Arkansas, No. CR 82-54, is attached as Appendix A.

The Supreme Court of Arkansas denied Petitioners' Petition for Rehearing on October 3, 1983. A copy of the Order denying rehearing is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

> "No person shall...be deprived of life, liberty, or property, without due process of law..."

United States Constitution Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . and to be confronted with the witnesses against him..."

United States Constitution Amendment VIII:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution Amendment XIV:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

STATEMENT OF THE CASE

On January 8, 1983, Don Lehman was at his house at 11 Cedarbrook Lane, Rogers, Arkansas, with his wife, Virginia Lehman, and his older daughter, Vickie Lehman. The doorbell rang and Don Lehman arose from bed to answer the door. After inquiring who was there and receiving the answer of "David", Don Lehman unlocked the door and started to open it. A struggle immediately ensued as Don Lehman attempted to close the door. The door was forced open by four men wearing masks. At least two men struggled with Don Lehman while one of the intruders grabbed Vickie Lehman who had also responded to the doorbell, and threatened her, while directing the fourth man to help in the struggle against Don Lehman. Don Lehman ran for his bedroom, followed by at least two men, where he asked his wife, Virginia, to "get the gun". Virginia was told to put her head on the floor or she would get the same thing.

Don Lehman was shot three times, twice fatally. The intruders took Vickie's Christmas money ($70), $1,200, and a Derringer from Don Lehman's nightstand and Don Lehman's guns from the living room.

On January 9, 1981, the Benton County Sheriff received information which caused them to consider Michael Orndorff as a suspect. Orndorff and James William Holmes were arrested January 9, 1981. Darryl Richley was arrested in Fayetteville after police searched his automobile, a 1966 four-door Chevrolet Chevell, which revealed several weapons belonging to Don Lehman. Hoyt Clines was detained by the Benton County Sheriff the evening of January 9, 1981, and arrested on January 10, 1981. The four suspects were taken before a municipal judge on January 12, 1981. The Judge found probable cause to hold the four suspects without bond on the charge of capital murder.

Various motions were heard and disposed of by the Court during the period prior to trial commencing September 28, 1981. The State's case began on October 13 and evidence was presented by the State and by defendants until on October 21, 1981, when, at the conclusion of defendants' case, the Court adjourned after admonishing the jury. Court reconvened on October 26, 1981, the jury was instructed and heard closing arguments. The Jury retired to deliberate at 4:12 p.m.; the Court reconvened at 5:12 p.m. and the jury returned guilty verdicts on all counts. On October 27, 1981, the jury was instructed and heard arguments on the matter of sentencing. The jury retired to deliberate at 5:28 p.m. Court reconvened at 9:58 p.m. at which time the jury verdicts were returned setting sentence at death on the capital murder charge and life imprisonment on each count of aggravated robbery in the case of each defendant. On October 30, 1981, each defendant was sentenced to death for capital murder and to life imprisonment on each count of aggravated robbery, running consecutively, as shown in the Judgment and Commitment at Appendix C.

Appeals were taken to the Arkansas Supreme Court which affirmed the trial court in its opinion on July 5, 1983. Appendix A.

The Court was petitioned to rehear the case. The rehearing was denied October 3, 1983. Appendix B.

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF SEVERANCE VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

A.

Petitioners were entitled to severance under the law and denial of that right deprived them of due process of law guaranteed by the Fourteenth Amendment.

When two or more defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to severance. Init. Meas. 1936, No. 3, §29, Acts of Arkansas, 1937, p. 1384, 1396, 1397, codified as ARK. STAT. ANN. § 43-1802 (1977 Repl.):

> 43-1802. Felonies. - When two (2) or more defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to a separate trial; when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court. When separate trials are ordered in any case, the defendants shall be tried in the order directed by the court. (Crim. Code, § 236 (2nd sentence); C. & M. Dig., § 3140; Init. Meas. 1936, No. 3, § 29, Acts 1937, p. 1384; Pope's Dig., § 3976; Acts 1945, No. 209, § 2, p. 488.)

ARK. STAT. ANN. § 43-1802 is the only Arkansas Statute which had made mandatory the granting of severance. Vault v. Adkisson, 254 Ark. 75, 491 S.W. 2d 609, 610 (1973). "And we hold that it very clearly provides severance as a matter of right only in cases where the accused upon conviction is subject to the imposition of the death penalty." id at 611.

Act 470, Acts of Arkansas, 1971, P. 1126-1128, set forth verbatim in Appendix D, empowered the Supreme Court of the State of Arkansas to prescribe rules of pleading, practice and procedure in criminal cases, etc.

Pursuant to Act 470, the Supreme Court, acting by its Chief Justice, and the Attorney General joined in creating the Arkansas Criminal Code Revision Commission. The Commission was divided into two committees. One was charged with revising the substantive law culminating in the adoption by the General Assembly of Act 280 of 1975, the Arkansas Criminal Code, effective January 1, 1976. The other committee was charged with revising the Rules of Criminal Procedures and culminated in the Supreme Court adopting the Rules of Criminal Procedure, effective January 1, 1976. Rule 22 of the Rules of Criminal Procedure is set out in infra P. 12 . It in effect repeals Ark. Stat. 43-1802 and allows the state the option to sever the defendants for trial but deprives the defendant of that right unless the trial court in its discretion grants severance.

Amendment No. 7 to the Arkansas Constitution, entitled "Initiative and Referendum", vests the legislative power of the people in a General Assembly, but reserves the power to propose legislative measures, laws and amendments to the Constititution, and to enact or reject the same at the polls independent of the General Assembly. Constitution of Arkansas, Amendment No. 7, §1. No measure approved by a vote of the people shall be amended or repealed by the General Assembly...except on a yea or nay vote on roll call of two-thirds of all members elected to each house of the General Assembly. Id. General provision, Amendment and Repeal.

It is well settled that legislative bodies have no right to delegate the lawmaking power to commissions and boards established by the legislature, but it is equally well settled that the legislature may delegate the power to determine facts upon which the law makes or intends to make its own action depend and that general provisions may be set forth with power given to those who are to act under such general provisions to complete the details. McArthur v. Smallwood, 225 Ark. 328, 281 S.W. 2d 428, 431 (1955). ...the test resorted to in

determining whether any bill, law, resolution or ordinance is legislative or administrative is to determine whether the proposition is one that makes new law or to execute a law already in existence. The power or authority to be exercised is legislative in nature if it prescribes a new policy or plan; while on the other hand, it is administrative in nature if it simply pursues a plan already adopted by the legislative body,... City of North Little Rock v. Gorman, 264 Ark. 150, 568 S.W.2d 481, 485 (1978).

> Generally, the failure of a state court to comply with the provisions of state law in its criminal trials is purely a matter of local concern and is not reviewable by federal courts under the due process clause of the federal Constitution. The failure of a state to afford a particular defendant the benefit of established procedures under state law may, however, result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure. Klimas v. Mabry, 559 F 2d 842, 849 (1979).

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. Paul v. Davis, 424 U.S. 693, 710, 711 (19).

As can be seen from the foregoing, the Petitioners were entitled to severance as a matter of right. The General Assembly empowered the Supreme Court to establish Rules of Criminal Procedure, Rule 22 of which is held by the Supreme Court, to supercede Petitioners' rights to severance (Init. Meas. No. 3, § 29, supra) even though Arkansas Constitution Amendment No. 7, supra, requires that initiated measures must be repealed by a vote of two-thirds of both the Senate and the House of

Representatives. Denial of severance to Petitioners through reliance on procedures adopted without the legislative approval required by the Constitution is a denial of due process guaranteed to Petitioners by the Fourteenth Amendment.

B.

The trial court admitted into evidence out of court statements which were prejudicial and refused to admit evidence which was exculpatory, thereby violating Petitioners' rights under the Sixth and Fourteenth Amendments.

All defendants in the present case filed motions for severance pursuant to Arkansas Rule of Criminal Procedure 22. In support of their requests for severance, defendants separately argued that out-of-court statements made by co-defendants making reference to other defendants but which were inadmissible against other defendants would be offered by the State as evidence at trial, and that references to particular defendants could not be removed without prejudice as set forth in Arkansas Rule of Criminal Procedure 22.3(a). Defendants each argued that severance was necessary for a fair determination of guilt or innocence pursuant to Arkansas Rule of Criminal Procedure 22.3(b), and that failure to sever eliminated defendants' right to confrontation and cross-examination regarding co-defendants and denied defendants the right to call co-defendants as witnesses on their behalf.

It was also argued by defendants Orndorff and Holmes, in support of their motions for severance, that their defenses were antagonistic to the defenses of the other co-defendants. Defendant Orndorff separately argued for severance for the additional reason that he had an affirmative defense not available to others since evidence indicated he had

asked to be taken home before the incident, did not have a gun, took no part in harming anyone, attempted to permit a call for help and received none of the items allegedly taken. Also, defendant Orndorff argued in support of his motion for severance that statements made by co-defendants and other witnesses were exculpatory as to him and that severance was necessary to permit introduction of such statements which were inadmissible as to other co-defendants.

All motions for severance were denied by the trial court.

The law of Arkansas regarding severance is set out in ARK. STAT. ANN. § 43-1802 (Repl. 1977), Arkansas Rules of Criminal Procedure 22.1 et seq. and in interpretative caselaw.

ARK. STAT. ANN. § 43-1802 (Repl. 1977) provides:

> "When two (2) or more defendants are jointly indicted for a capital offense, any defendant requiring it is entitled to a separate trial; when indicted for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court. When separate trials are ordered in any case, the defendants shall be tried in the order directed by the court."

In Vault v. Adkisson, 254 Ark. 75, 491 S.W.2d 609 (1973), the Arkansas Supreme Court held that ARK. STAT. ANN. §43-1802 provides for severance as a matter of right in cases where the accused upon conviction is subject to imposition of the death penalty.

In January of 1976, the Arkansas Rules of Criminal Procedure were adopted. Rule 22.3 deals with severance of defendants as follows:

"(a) When a defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall require the prosecuting attorney to elect one (1) of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, providing that, as deleted, the statement will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a) shall grant a severance of defendants:

(i) if before trial it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one (1) or more defendants; or

(ii) if during trial, upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one (1) or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendant which he intends to introduce in evidence at trial.

In Hallman v. State, 264 Ark. 900, 575 S.W.2d 688 (1979), the Arkansas Supreme Court ruled that ARK. STAT. ANN. §43-1802 was superseded by Arkansas Rule of Criminal Procedure 22 (Repl. 1977). The three defendants in Hallman were convicted of capital murder and kidnapping, and appealed from those convictions arguing the trial judge erred in not granting them separate trials. The Arkansas Supreme Court upheld the convictions, finding no

abuse of discretion by the trial judge in refusing the requested severances.

Central to the Court's ruling in Hallman were four essential circumstances which distinguish the facts in Hallman from the facts of the present case. First, in Hallman, the defendants had been granted a separate trial early in the proceedings, but after the state waived the death penalty, the trial judge rescinded his previous order and ordered joint trials. Second, the Court noted that the defenses of Petitioners were not antagonistic. Third, the Court noted that all defendants testified and cross-examination permitted the appellants to refute any adverse testimony of co-defendants. Fourth, the Court in Hallman noted that all out-of-court statements that were made by the defendants were altered to delete any reference to co-defendants.

In the case at bar none of the protective circumstances relied upon by the court in Hallman to justify a joint trial were present. In the present case, the state did not waive the death penalty and all defendants were, in fact, sentenced to death. In the present case, the defenses of the co-defendants were entirely antagonistic, each having asserted in prior statements and one actually testifying that someone other than themselves was responsible for the death giving rise to the capital murder charge. In the present case only one of the four defendants testified, thus eliminating any cross-examination or confrontation of the other three co-defendants. Further, in the present case, an out-of-court statement by

co-defendant Richley, who did not take the stand, was admitted which implicated other co-defendants (Tr. 3758-3765).

These circumstances, when taken together, reflect an abuse of discretion by the trial judge in not granting defendants' motions for severance. The circumstances of the present case violate Rule 22.3(a) due to the out-of-court statements of co-defendants implicating other defendants which were admitted during the course of the trial and also violate the rules set out in Bell v. State, 258 Ark. 976, 530 S.W.2d 662 (1975) regarding opportunity for cross-examination and Byrd v. State, 251 Ark. 149, S.W.2d 350 (1971) regarding deletion of reference in statements to co-defendants. Both Bell and Byrd were cited by the court in Hallman on the severance issue where the court found their requirements had been satisfied.

In McDaniel and Gookin v. State, 278 Ark. 631, 648 S.W.2d 57 (1983), the Arkansas Supreme Court reversed the capital felony murder convictions of both co-defendants holding the trial court erred in refusing to sever the charges and try them separately. In support of reversal, the court discussed seven factors favoring severance as follows:

> (T)he issue of severance is to be determined on a case by case basis, considering the totality of the circumstances, with the following factors favoring severance: (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if

> one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other. We think it significant that in some degree all of these factors are present here.

Likewise, in the present case, all seven factors favoring severance are present.

(1) In the present case the defenses of all defendants were antagonistic.

Michael Ray Orndorff moved the court to sever the trials of defendants, pointing out that their defenses were antagonistic. (Tr. 58-61) Defendant Orndorff moved for dismissal of the charges or for severance because he was the one who wanted to call an ambulance for Mr. Lehman, and argued that Vickie Lehman's testimony was exculpatory to himself. Clines joined in this motion which was overruled. (Tr. 3100-3101) Defendant Richley asked witness Steve Baker if he stated he was not trying to protect Orndorff (Tr. 3001-3003). Defendant Orndorff objected to references made by defendant Richley's landlady, Lois Stratton. (Tr. 3413) Defendant Orndorff also requested he be allowed to introduce the confession of a co-defendant to Mr. Sydoriak stating that Orndorff was in no way involved in the fighting. His request was denied. (Tr. 3907-3908).

Defendant Holmes moved for severance based upon, among other things, the fact that the defenses of his co-defendants would be antagonistic to his defense. (Tr. 134-137) During the testimony of Tammy Baker, Holmes objected to the admissibility of statements made by Orndorff to Tammy Baker concerning Holmes.

(Tr. 223-225) In chambers, defendant Holmes moved for severance because he wanted read into the record a statement, exculpatory to him, that one of his co-defendants who was in the room where Mr. Lehman was killed had just been released from prison. The motion was overruled and the statement excluded. (Tr. 3771-3774) Defendant Orndorff also requested the statement be admitted as exculpatory to him, but his motion to dismiss was overruled. (Tr. 3775).

Evidence of prior bad acts of various co-defendants also was antagonistic to the defenses of the others. Defendant Richley objected to introduction concerning prior bad acts. Defendant Orndorff, along with the prosecution, wanted all the evidence introduced except for item five. Clines objected to all of the prior bad acts testimony (Tr. 3600-3613). Orndorff objected later regarding prior bad acts as to him being admitted (Tr. 3615) and defendant Holmes moved for severance and mistrial on this basis. (Tr. 3628)

Defendant Clines objected to introduction of an out-of-court statement made by defendant Richley to Freddie Baker implicating Clines. (Tr. 3763-3765). Following defendant Orndorff's attempt to introduce the confession of a co-defendant to Mr. Sydoriak that Orndorff was in no way involved in the fighting with Mr. Lehman, defendant Clines moved for a severance and argued along with the prosecuting attorney and other defense counsel that the confession should be excluded. (Tr. 3898-3905).

Even a superficial review of the transcript in this case reveals that the four co-defendants were each attempting to show one of the others was

the "trigger-man". The defenses could not have been more antagonistic than in the present case.

(2) In the present case it as difficult to segregate the evidence to determine which defendant was actually guilty of the crime. As in McDaniel and Gookin v. State, irreconcilable jury verdicts were returned in the present case regarding mitigating circumstances.

In the case of Hoyt Clines, the jury found that "(3) the capital murder was committed by another person and Clines was an accomplice and his participation relatively minor." (Tr. 162) Form 2, Mitigating Circumstances (C)(3). For James William Holmes, the jury found on Form 2 - Mitigating Circumstances (C)(2) that "The capital murder was committed by another person and James William Holmes was an accomplice and his participation relatively minor." (Tr. 170) On Form 2 - Mitigating Circumstances (C)(2) "the capital murder was committed by another person and Darryl Richley was an accomplice and his participation relatively minor." (Tr. 177) For Michael Ray Orndorff on Form 2 - Mitigating Circumstances (B)(3) that "The capital murder was committed by another person and Michael Ray Orndorff was an accomplice and his participation relatively minor." (Tr. 183)

(3) In the present case there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant.

None of the defendants testified at the trial of this case except James William Holmes. Mr. Holmes' testimony exculpated himself (Tr. 4008-4138)

and implicated co-defendant as follows:

Hoyt said, "Keep going." (Tr. 4018) Hoyt Cline had a motorcycle chain belt. (Tr. 4019) Hoyt Cline started beating this man with the chain. (Tr. 4020) And they was wrestlin'....with the man and Hoyt was beating him with the chain. (Tr. 4021) During the period of time that I was doing that, I heard two gunshots back towards the front somewhere. (Tr. 4028) I was just about to the door of the room when I heard the other gunshot. (Tr. 4028) I saw two people in there,....but I believe it was Darryl and Hoyt, standing by the bed. (Tr. 4029) She started to hand the envelope to Mike, but Hoyt snatched it. He yanked it open and said, "That isn't any money," or something like that. (Tr. 4033) I saw Hoyt take his mask off when he was pulling the phone out of the wall. I don't believe he put his mask back on. He didn't actually have a ski mask, he was wearing a nylon stocking,...(Tr. 4038) I did have a conversation with her, at one point when I was by the door, I said, "I don't want to have any part of the murder." (Tr. 4038) I was not the fat boy with long, blond hair that jumped on her daddy and got him down by the dining table as Vickie testified to....I didn't hit the man, I think she was wrong. I believe Hoyt is the one that jumped on the man. I believe Darryl helped him. (Tr. 4079) I had to burn Hoyt's T-shirt because it had blood on it. A pair of gloves had blood in them, too. I did not get blood on my tennis shoes. (Tr. 4098)

(4) In the present case one defendant or co-defendant could have and did deprive another

defendant of all peremptory challenges.

The Court's requirement that the peremptory challenges be exercised collectively and that no additional challenges would be allowed despite the number of defendants clearly violated all defendants' rights to equal protection and due process of law.

Prior to trial, defendant Clines filed a motion to increase the number of peremptory challenges and brief in support (Tr. 142) which was joined in by defendants Orndorff and Richley. The motions were overruled (Tr. 535-536).

During jury selection, the court required a collective exercise of peremptory challenges by defendants (Tr. 630) and twelve peremptory challenges were exercised by three co-defendants (Tr. 701, 822, 1224, 1396-7, 1438, 1783-4, 2061, 2180, 2346, 2463, 2558, 2617).

Subsequent to exercise of the above peremptory challenges by specific defendants as noted, defendant Holmes attempted to exercise a peremptory challenge against juror Payton. This challenge was denied because twelve peremptory challenges had previously been exercised by other defendants even though none had been exercised by defendant Holmes. (Tr. 2696-97) Defendant Orndorff pointed out that at least one of the peremptory challenges had been exercised on his behalf without conferring with other counsel. The trial court ruled that it didn't make any difference. (Tr. 2698)

Clearly in this case the factor set out in McDaniel and Gookin v. State that one defendant could have deprived the other of all peremptory challenges

was present. Indeed, it is clear that defendant Holmes was in fact deprived of all peremptory challenges due to the trial court's failure to grant defendants' severance motions.

(5) In the present case only defendant Holmes testified in his own defense. While this did not "compel" the other defendants to testify, it certainly brought to the jury's attention the fact that the other defendants did not take the stand.

(6) In the present case defendants Orndorff, Holmes and Richley had no prior criminal records. Defendant Cline had a prior criminal record for burglary evidence which was elicited by the state during cross-examination of a witness testifying during the mitigation phase of this proceeding. (Tr. 4519).

(7) The transcript in the present case shows circumstantial evidence against one defendant or co-defendant appears to be stronger than against others.

Considering the totality of the circumstances of this case, and the apparent inability of the jury to resolve the issue of guilt evidenced by the mitigating circumstance verdict forms, defendants were entitled to separate trials. In the present case, as in McDaniel and Gookin v. State, it was the prosecution's strategy to permit the four defendants to try each other and to convict all four defendants as a group, never attempting to identify the culpable party and, in fact, arguing that it did not matter who fired the fatal shot. (Tr. 4254, 4277, 4278, 4280, 4283)

Abuse of discretion in denying severance under Arkansas Rule of Criminal Procedure 22.3(a) and (b) and denial of defendants' Sixth and Fourteenth amendment rights clearly occurred in the present case.

All defendants in the present case requested severance on the ground that severance was necessary for a fair determination of guilt or innocence. The case at bar is a classic example of a case which should have been severed from the outset. All of the evils and denials of constitutional rights under the Sixth and Fourteenth Amendments avoided in Hallman and McDaniel and Gookin v. State were visited upon defendants in the present case. In addition to the denial of confrontation, cross-examination and peremptory challenges previously discussed, all defendants suffered prejudice from the fact that their defenses were antagonistic to each other, particularly regarding Orndorff's affirmative defense of non-participation in an attempt to withdraw from the events surrounding the death and including arguments by all four defendants that someone else of the four must have been the "trigger-man".

These specific problems coupled with the general development and presentation of the trial of this case eliminated any chance of defendants receiving a fair determination of their guilt or innocence, as required by Rule 22.3 and the United States Constitution.

Severance of defendants' trials could easily have avoided all of the infringements of constitutional rights regarding confrontation and cross-examination and could have secured for each defendant a fair trial

and due process of law. Severance was timely requested by each defendant prior to trial, and the reasons requiring severance were clearly set out. This case presents a classic example of the "smear" effect and denial of constitutional rights which the United States Constitution and rules regarding severance were enacted to prevent.

In addition to the arguments set out above which require reversal based on failure to sever as to all defendants, defendant Holmes and defendant Orndorff suffered additional prejudice from denial of their motions for severance which, coupled with the other previously stated prejudice suffered by them, clearly mandates reversal of their convictions.

Both Holmes and Orndorff, at trial, requested that out-of-court statements of co-defendants be offered into evidence. (Tr. 3771-3776) (Tr. 4587) Both Holmes and Orndorff moved the court to allow the out-of-court statement of co-defendant Richley made to Freddie Barker into evidence because it was exculpatory as to them. The Richley statement established that the person in the room with Richley when Mr. Lehman was shot was neither defendant Holmes nor defendant Orndorff. The trial court erred in refusing to grant severances to allow this exculpatory statement into evidence on behalf of Holmes and Orndorff.

In addition, Orndorff requested that two out-of-court statements by co-defendant Cline be admitted into evidence because they were exculpatory to him (Tr. 4587). These statements appear at Tr. 4604-4677.

The following statement exculpatory of defendants Holmes and Orndorff is contained in the out-of-court statements of co-defendant Cline which counsel attempted to introduce into evidence.

> Yesterday I stayed at Patty's house until about 9:00 in the evening. I left with Mike Orndorff and two other guys (Tr. 4609). The two guys in the front seat had guns. I didn't. I don't think Orndorff did either. Three people were in the house, one man, one woman and a girl. The guy in front ran after the guy. The fat guy and Mike took off someplace else and ran into the bedroom where that one guy was (Tr. 4614 and 4615). I guess the other guy who was in the room with me shot the man. Just that tall guy was in the bedroom when the shots were fired. Me and Mike was outside getting ready to go because Mike and the fat guy got a bunch of guns. (Tr. 4617).
>
> The guy opened the door and everyone rushed in. That's all I seen until me and this other dude ran off in the bedroom...the one with glasses on. The man that opened the door ran back to the bedroom (Tr. 4640). The one with glasses grabbed him. Mike and them went in another room, a gun room, and Mike and the big fat guy were all at the front door when I heard the shots (Tr. 4643).
>
> I didn't have a gun. Mike didn't have one. (Tr. 4649). Mike and the fat dude were going to let the daughter make a phone call in the kitchen. I guess I came running in there and said no and yanked the phone away from her--away from Mike (Tr. 4651). I don't know why the girl would be confused as to who was in the room when her dad was shot. The only person I think was in the room was this guy with the glasses on (Tr. 4653). Mike Orndorff doesn't wear glasses (Tr. 4654).
>
> The guns were taken out of the car by Bill and Darryl and put in the white '65 or '66 Chevrolet. I don't know which one it belonged to (Tr. 4661). That's the last I seen of the guns (Tr. 4662). I would not cover up for Mike Orndorff (Tr. 4672).

Counsel for defendant Orndorff also tried unsuccessfully to introduce testimony of Deputy Sheriff Sydoriak, regarding an out-of-court statement by defendant Cline during fingerprinting that he was the one beating Lehman with a chain and that James Holmes and Darryl Richley were wrestling with Lehman and he was sure Richley was the one who shot him. (Tr. 3887).

The testimony was excluded due to Sixth Amendment confrontation rights of the other three co-defendants despite counsel's reference to severance as a remedy for such and request that the statement be introduced with inadmissible references to co-defendants excised (Tr. 3898 and 3908).

Likewise, counsel for defendant Orndorff unsuccessfully attempted to introduce into evidence recorded statements of Mr. Freddie Barker, Miss Vickie Lehman and Mrs. Virginia Lehman given to police officers which contain exculpatory statements regarding defendant Orndorff. These statements appear at pages 4153 through 4200 of the trial transcript.

The statements which counsel for defendant Orndorff sought to introduce were excluded from evidence in an attempt to protect the rights of co-defendants implicated in the statements. Failure to either admit the exculpatory statements regarding defendant Orndorff absent reference to their co-defendants, or to grant a severance to defendant Orndorff clearly prevented him from presenting evidence and calling witnesses in his defense, eliminating whatever chance he had to a fair consideration of his guilt or innocence.

Where, as in the present case, defense counsel indicated his desire to use the testimony of a co-defendant, and where there was substantial likelihood that such testimony would be exculpatory and that it might be available in a separate trial but not in a joint trial, denial of defendants' motion for severance in a state criminal prosecution constitutes denial of due process guaranteed by the

Fourteenth Amendment. Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

Petitioner Clines also suffered additional prejudice from the denial of his motions to sever based on the fear that cross-implicating out-of-court statement by co-defendants would be heard by the jury. Clines moved for a mistrial after a witness, Freddie Barker, testified to out-of-court statements made by a co-defendant, Darryl V. Richley, that implicated Clines. (Tr. 3758-3765) The motion was overruled and no cautionary instruction was given to the jury. (Tr. 3764-3765) Darryl V. Richley did not testify in his own behalf and as a result, the Petitioner was unable to cross-examine him as to the statements introduced.

References to Petitioner by Freddie Barker's testimony were not directly by name, but, rather, by inference. Freddie Barker identified the Petitioner as the one who had taken his mask off. (Tr. 3758-3759) Previous testimony established that Clines was the only defendant who had removed his mask. (Tr. 3156-3160) The statements made by a co-defendant who invokes the Fifth Amendment need not directly refer to the other co-defendant by name. When the identity of the co-defendant can be determined by other evidence, the defendant is implicated in the same manner as he would be if his name were used. The out-of-court statement of Darryl Richley was definite and clearly implicated Clines.

The Arkansas Supreme Court has held that statements made by an accomplice to Capital Murder to

a police officer when the accomplice invokes the Fifth Amendment are inadmissible. Brewer v. State, 271 Ark. 254, 608 S.W.2d 363 (1980).

The testimony of Freddie Barker concerning the out-of-court statements of Darryl Richley that implicated Clines was clearly hearsay and inadmissible. Ark.R.Evid. 801, 802.

The statements of Darryl Richley to Freddie Barker, as testified to at trial by Freddie Barker, were out-of-court statements made by a co-defendant whom Clines could not cross-examine at trial. The statements were hearsay and Clines was denied his constitutional right to confront and cross-examine the witness against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Bruton v. United States, 391 U.S. 123 (1968); Byrd v. State, 251 Ark. 149, 471 S.W.2d 350 (1971); McCroskey v. State, 266 Ark. 806, 586 S.W.2d 1 (1979).

C.

The denial of severance resulted in the trial court limiting the Petitioners to twelve peremptory challenges, the same number allowed a defendant separately, violating the equal protection and due process rights of Petitioners under the Sixth and Fourteenth Amendments of the U. S. Constitution.

The trial record reflects that during the voir dire examination of prospective jurors, the Petitioners Cline, Orndorff and Richley, exercised twelve peremptory challenges. After the twelfth challenge had been used, at the point at which Patricia Payton was being examined, Petitioner Holmes attempted to exercise his first peremptory challenge. (TR. 2697) The Court ruled that ARK. STAT. ANN. § 43-1922 allows only a total of twelve peremptory challenges regardless of whether there is one or more defendants and, therefore, the challenges had been exhausted by the appellants. ARK. STATS. § 43-1922 is as follows:

> "The defendant shall be entitled to twelve (12) peremptory challenges in prosecutions for capital murder, to eight (8) peremptory challenges in prosecutions of all other felonies, and to three (3) peremptory challenges in prosecutions for misdemeanors. (Init. Meas. 1936, No. 3 § 18, Acts 1937, p. 1384; Pope's Dig., § 3998; Acts 1981, No. 115, § 1, p. 243.)"

The Arkansas Supreme Court has interpreted ARK. STAT. § 43-1922 in this respect on three separate occasions: Hearne v. State, 121 Ark. 460, 181 S.W.2d 291 (1921); Lewis v. State, 220 Ark. 914, 251 S.W. 2d 490 (1952); and Williams v. State, 267 Ark. 527, 593 S.W. 2d 8 (1980). In spite of these decisions the instant case is actually one of first impression for the reason that this is the first time the issue has been raised in a capital felony case since the effective date of the Rules of Criminal Procedure on January 1, 1976. Hearne is the only capital felony case cited and was tried when the defendants were entitled to automatic severance pursuant to the provisions

of ARK. STAT. ANN. § 43-1802, which has since been replaced by Rule 22.2 of the Arkansas Rules of Criminal Procedure.

The reasoning behind the ruling in Hearne is largely based on the fact that under § 43-1802 any defendant charged with capital murder was entitled to severance automatically upon request, therefore, by failing to so request, the right to the maximum number of peremptory challenges was waived. Such reasoning is, of course, no longer valid since the adoption of the Rules of Criminal Procedure.

Both Lewis and Williams used ARK. STAT. ANN. § 43-1929 (which states that the challenge of one defendant shall be the challenge of all) as support for the holding in Hearne, even though there is no reference to it in the opinion. In light of the fact that under the prior law the defendant was in a position to determine whether or not a separate trial would be conducted as opposed to the present rule which grants that option to the State of Arkansas, the basis for the rationale in Hearne no longer exists. The result impugns the doctrine of fairness out of which the right to peremptory challenges evolves.

An analysis of the treatment given this problem by other states reveals that in those states where the language of the statute is similar to that of Arkansas, the following states have held that each defendant or co-defendant is entitled to the specified number of peremptory challanges: Colorado, Georgia, Kansas, Michigan, Mississippi, New Hampshire, New York, North Carolina, Ohio, Vermont and Wisconsin. Those states expressing a view similar to Arkansas - that is, that the specific number of peremptory challenges must be exercised collectively when there are two or more defendants - are: Maine, New Hampshire, New Jersey and Rhode Island. It is noted that both Georgia and New Hampshire have applied the rule both ways depending upon varying circumstances. 21 A.L.R. 3d 725.

"The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury," Lewis v. United States,

supra; that such right "is one of the most important of the rights secured to the accused," Pointer v. United States, 151 U.S. 396 (1894); and more recently in Swain v. State of Alabama, 380 U.S. 202 (1965), that the "persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." In the case of Hayes v. Missouri, 120 U.S. 68 (1887), the Court said "experience has shown that one of the most effective means to free the jurybox from unfit jurors is the exercise of the peremptory challenge. Both the prosecution and the defendant may have the strongest reasons to distrust the character of a juror offered, ...yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted." This observation has been substantiated in a recent study by Zeisel and Diamond, The Effect of Peremptory Challenge On Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 495 (1978). Also, the Court in the Second Circuit in the case of United States v. Newman, 549 F. 2d 240 (2d Cir. 1977) said, "the right to peremptory challenges is of great importance, both to the Government and to defendants, but mostly to defendants. ...It is one of the greatest safeguards the law provided for a fair trial."

Since the right to have peremptory challenges is so closely associated with the right to a trial by jury, petitioners contend that this right has become a fundamental right just as the right to a trial by jury is fundamental.

Appellants are mindful that the Supreme Court has in the past rejected this argument. In Stilson v. United States, 250 U.S. 583 (1919), the Court said that "there is nothing in the Constitution which requires the Congress to grant peremptory challenges, but that trial by impartial jury is all that is secured." Also, in Frazier v. United States, 335 U.S. 497 (1948) the Court said that, "the peremptory challenge was in the nature of a statutory privilege."

However, the rights of individuals and especially criminal defendants have been greatly expanded since even the Frazier case. Many of these added rights were not directly mentioned in the Constitution but simply affected the exercise of a right that was provided for in the Constitution. Appellant maintains that the proper approach taken by the Court in Shapiro v. Thompson, 394 U.S. 618 (1969) where the court invalidated a waiting-period requirement for welfare payments because it burdened the fundamental right of interstate movement, which, incidentally, is not found in the Constitution. Since the peremptory challenge is such an integral part of the right to trial by jury, it should be protected as a fundamental right.

If the peremptory challenge is a fundamental right then, any type of state action that would restrict or inhibit the exercise of that right would have to be closely scrutinized. The strict scrutiny or compelling interest test is the test used to judge state laws or actions which touch a fundamental right. See Shapiro v. Thompson, supra.

The apparent state interests in restricting defendants in joint trials to the same number that are allowed in individual trials are economy of time and money. The state will not have to bear the expense of separate trials. Also, the state probably would not have to provide as large a voir dire. The appellants maintain that these are not compelling arguments when compared to the use of peremptory challenges and their effect on a fair trial.

Whether the right of peremptory challenges is fundamental or not, appellants maintain that the state's granting defendants charged with crimes punishable by death or life imprisonment twelve peremptory challenges when they are tried separately but only providing twelve for four defendants tried jointly for the same type of crime is arbitrary and irrational and as such violated the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment requires that "like things be treated alike", the Court said in Yick Wo v. Hopkins, 118 U.S. 356 (1885). Also, the Court in Califano v. Jobst, 434 U.S. 47 (1977) said, "Legislators cannot base differences in treatment on distinctions which irrationally differentiate between identically situated persons." When two persons are charged with the same crime but one is allowed twelve peremptory challenges because he is tried separately, while the other is allowed a total of twelve peremptory challenges to be exercised among as many defendants as the state wishes to join, this is an example of treating like things differently and is repugnant to the equal protection clauses of both the United States Constitution and the Arkansas Constitution.

In determining whether a classification denies equal protection of the laws, the court must consider whether the difference does injustice to the class generally, even though it bears hard in the particular case. Bain Peanut Co. v. Pinson, 282 U.S. 499 (1930). In this case defendants who are tried jointly always lose a number of peremptory challenges, while the defendant that is granted severance or simply tried alone receives the full number. This action adversely affects all joint defendants.

The Court in Dunn v. Blumstein, 405 U.S. 330 (1971) used the following criteria to determine whether a law is violative of equal protection: (1) the character of the classification; (2) the individual interest asserted in support of the classification; and (3) the governmental interest asserted in support of the classification. In considering the first criteria, the character of the classification, it is apparent from the nature of the classification that all joint Petitioners will be adversely affected. Prior to Rule 22 of the Arkansas Rules of Criminal Procedure, defendants in a capital crime had a right to keep the statutory number of peremptory challenges by demanding separate trials. Now defendants have no absolute way to keep the statutory number of peremptory challenges

because Rule 22 has taken away this right to a separate trial. The citizens of this state should have a stronger interest in having a fair trial (and also the appearance of a fair trial) than their interest would be in the money and time saved by either granting separate trials or allowing joint defendants the same number of challenges as single defendants would have. It would seem that the governmental interest ought to be the same as those of its citizens.

Thus, considering the importance of peremptory challenges to the right of a fair trial, and the interest of the state in restricting the number of peremptory challenges to the class of defendants, we believe that restricting the number peremptory challenges to joint defendants is irrational and as such is unconstitutional. Associate Justice Purtle's dissent, at Appendix A 17 supports Petitioners' claim for severance and the claim for more peremptory challenges.

D.

The denial of severance caused petitioners to be sentenced jointly, violating due process and the prohibition against arbitrary death sentences of the Fourteenth and Eighth Amendments, respectively.

The importance of individual consideration of a defendant in capital cases has been stated several times by this Court. In Enmund v. Florida, 102 S. Ct 3368, 73 L.Ed. 2d 1140 (1982), this Court stated:

> "(this Court) insist on individualized considerations as a constitutional requirement in imposing the death sentence."

The Court cited Lockett v. Ohio, 4388 U.S. 586 (1978), where it was stated:

> "Given that the imposition of death by public authority is so different from all other penalties, we cannot avoid the conclusion that an individual decision is essential in a capital case."

Associate Justice Dudley's dissent, at Appendix A 14-15, supports petitioners' argument for severance in the sentencing phase of the bifurcated trial. His opinion is consistent with the holdings of this Court concerning the matter of an individual decision in a capital case.

Associate Justice Purtle's concern, "For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase." Appendix A 17 , is confirmed as to Clines and at least partially with regard to Orndorff, Holmes and Richley as the Informations, Appendix E-1- 8 , by which certain allegations were made have been dismissed and the statute of limitations, Arkansas Rules of Criminal Procedure, ARK. STAT. ANN., Vol. 4A, Rule 28.1, has run. Justice Purtle's concern about the matter of "guilt by association", Appendix A 16 , emphasizes the problems which obtain when several defendants are tried jointly. The jury is not apt to treat them all alike, in spite of admonishments and promises to the contrary.

II.

THE ARKANSAS CAPITAL FELONY MURDER STATUTE AS APPLIED TO PETITIONERS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Arkansas capital felony murder statute (Ark. Stat. 41-1501) and the trial and sentencing procedures (Ark. Stat. 41-1301) are set forth at Appendix F2 and F1 respectively.

The Arkansas Felony Murder Doctrine is unconstitutional because it does not require the jury to consider the culpability of each individual defendant. Pursuant to ARK. STAT. ANN. § 41-1501(1)(a), an individual may be convicted of capital murder if he commits or attempts to commit one of the enumerated felonies and in the course of and furtherance of the felony, or in immediate flight therefrom "he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . ." The trial judge instructed the jury, pursuant to the model instructions, as follows:

> "Hoyt Franklin Cline, James William Holmes, Darryl V. Richley and Michael Ray Orndorff are charged with the offense of capital murder. To sustain this charge the State must prove the following things beyond a reasonable doubt:
>
> (a) First: That Hoyt Franklin Cline, James William Holmes, Darryl V. Richley and Michael Ray Orndorff, acting alone or with one or more other persons committed or attempted to commit the crime of Aggravated Robbery or Burglary; and Second: That in the course of and in furtherance of that crime or attempt Hoyt Franklin Cline, James William Holmes, Darryl V. Richley and Michael Ray Orndorff, or a person acting with him caused the death of Don Lehman under "circumstances manifesting extreme indifference to the value of human life." (TR. 4238)

The instruction clearly does not require a finding of culpability for each defendant. Nor is the jury required to find - via the verdict forms - that a co-defendant acted with a culpable mental state. (TR. 148 - 189)

The felony murder rule has been viewed with disfavor by many of the Courts and Legislatures that have recently considered it. In England, where it originated, the felony murder rule has been abolished. Section 1 of England's Homicide Act, 1957, 5 and 6 Eliz. 2, C. 11, §1. The Michigan Court observed that the felony murder rule flies in the face of modern culpability requirements and stated:

> "In situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed to results of another felon." Id. at 327.

The United States Supreme Court has joined the modern trend and held that consideration of individual culpability for the homicidal act is mandated by the Constitution of the United States. Enmund v. Florida, 102 S. Ct. 3368 (1982). In the Enmund case, the defendant was the driver of the escape car used in the robbery. The evidence failed to establish that he was one of the triggermen. Id. at 1145. Enmund was convicted of capital murder for being an accomplice to the robbery. This Court held that a defendant cannot be sentenced to death without considering the individual culpability of the defendant in connection with the homicide. To do so would result in the imposition of the death penalty for the underlying felony and not the homicide, a penalty that violated the Eighth and Fourteenth Amendments to the United States Constitution. See Coker v. Georgia, 433 U.S. 582 (1977)

Both the Michigan Court, in People v. Aaron, supra, and the United States Supreme Court, in Enmund v. Florida, supra, made reference to the Arkansas Felony Murder Doctrine as embodied in ARK. STAT. ANN. § 41-1501(1)(a). The Courts seemed to interpret the statute as requiring a culpable mental state. That certainly is not correct. The statute

provides that "he or an accomplice cause the death of any person under circumstances manifesting extreme indifference to the value of human life..." The Arkansas Supreme Court has held that a finding of culpability is not required for a conviction of capital murder. Bosnick v. State, 248 Ark. 846, 454 S.W. 2d 311 (1970); Venable v. State, 260 Ark. 301, 538 S.W. 2d 286 (1976). Petitioners respectfully submit that the decisions were in error and that the Model Jury Instructions given by trial courts in this state deprive the defendants charged with felony murder their constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution by not requiring a finding of individual culpability.

Even though the Arkansas Supreme Court and the Arkansas trial courts have held that intent is not required for the conviction of an accomplice for capital murder, the Arkansas Criminal Code clearly requires consideration by the jury of the culpable mental state for each individual. ARK. STAT. ANN. § 41-306 provides:

> "When two or more persons are criminally liable for an offense of which there are different degrees, each person shall be liable only for the degree of the offense that is consistent with his own mental culpability or with his own accountability for an aggravating fact or circumstance."

The commentary to the section states:

> "...the accomplice-actor is subject to that liability consistent with his own mental state."

The commentary to ARK. STAT. ANN. § 41-115(5) states that all offenses require some culpable mental state. ARK. STAT. ANN. § 41-1501(1)(a) only requires "he or an accomplice takes the life of any person under circumstances manifesting extreme indifference to the value of human life." All the Petitioners were convicted for the intent and actions of an unspecified principal. When there is no culpability requirement in a statute, one is nonetheless required. ARK. STAT. ANN. § 41-202(2). To convict the Petitioners, the jury should have been required to find the homicide was committed purposely, knowingly or recklessly. The trial court erred in not

instructing the jury as to the requirements of culpability as required by the United States Constitution and the Arkansas Criminal Code, ARK. STAT. ANN. § 41-207(2).

The Arkansas statutory scheme for determining which individuals will be sentenced to death and which individuals will be sentenced to life inprisonment without parole allows the arbitrary and capricious imposition of the death penalty. The jury must return a verdict of death if they find the aggravating circumstances outweigh the mitigating circumstances. ARK. STAT. ANN. § 41-1302. The jury is not given the flexibility required when considering a penalty of death. In effect, the statute provides for a mandatory death penalty which has been held unconstitutional by the Supreme Court as denying due process of the law. Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

Even more determinative of the arbitrary and capricious nature of the capital murder sentencing scheme is the unfettered discretion of the Prosecuting Attorney to waive the death penalty. The Prosecutor properly has discretion in which charges to bring. Miller v. Stat, 269 Ark. 341, 605 S.W. 2d 430 (1980); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604, 611 (1978). But the prosecutorial discretion goes only to bringing charges and not to the sentencing of one convicted of an offense. The Prosecutor, with the Court's approval, may waive the death penalty at his discretion. ARK. STAT. ANN. § 41-1307. The life or death of an individual thus hinges on the determination of one person.

The statute allows the Prosecutor to waive the death penalty in those cases where the defendant intended the death occur, while at the same time, it allows him to press for the death penalty in those cases where culpability cannot be shown but merely because of what the statute calls aggravating circumstances. Once the decision has been made

by the Prosecutor to charge an individual with capital murder, the Prosecutor ought not be able to hold the life of a defendant in his hands via his waiver powers.

The Arkansas Capital Murder Statute is unconstitutional because it denies the defendant the equal protection of the law as required by the Fifth and Fourteenth Amendments to the United States Constitution. There are currently twenty-three (23) men on death row in the State of Arkansas. There are no females currently under a sentence of death. The Capital Murder Statute sentencing procedure evidently affords the jury and prosecutor sufficient discretion to insure that only males are sentenced to death for Capital Murder. The statute, in practice, singles out a group of offenders, i.e., males, for more severe punishment than that given females similarly situtated. This is constitutional impermissible. Gregg v. Georgia, 428 U.S. 153 (1976). The individuals sentenced to death are denied equal protection of the law.

Even though the statute on its face does not provide for the discriminatory application of the death penalty, the application of the statute has that affect. The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of those laws. United States v. Falk, 479 F. 2d 616 (1973), citing Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). The Yick Wo case established that a law valid on its face may be unconstitutionally applied in a discriminatory manner so as to deny an individual or class of individuals equal protection of the law. The Arkansas Murder Statute results in discriminatory application of the more severe penalty of death on a class of individuals, males, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The number of males as opposed to the number of females on death row exemplifies the arbitrary and capricious application of the death penalty in Arkansas. Frankly, there are no statistics available to the defendant at this time to

illuminate the cause of the discrimination. There is no explanation other than the defendant in one case is a female and the defendant in another is a male. Impact alone is sufficient to establish the discriminatory effect of a statute, and, if established, is sufficient to violate the equal protection rights of the individual. Yick Wo v. Hopkins, supra.

The Arkansas Capital Murder Statute is unconstitutional because it is vague and overbroad. The phrase "under circumstances manifesting extreme indifference to the value of human life" fails to give individuals fair notice of the prohibited activity as required by the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution. It fails to apprise a person of ordinary intelligence fair notice of the forbidden conduct. Martin v. State, 261 Ark. 80, 547 S.W. 2d 81, 91 (1977), citing U. S. v. Hariss, 347 U.S. 612 (1954).

The wording of the statute could feasibly cover any form of activity that may, by mishap or otherwise, include unintentional acts of a perpetrator or a third person. In this respect, the statute is not only vague but also overbroad.

When considering whether a death penalty statute is void for vagueness, the Court considers the type of intent required by the statute. If specific intent is required, the statute is more likely to withstand constitutional challenge. Godfrey v. Georgia, 446 U.S. 420 (1980). The statute in this case has no culpability requirements other than "under circumstnances manifesting extreme indifference to the value of human life", unless one of the general culpable mental states is applied to the statute. If the culpability requirements are derived from those generally enumerated in ARK. STAT. ANN. § 41-115 - 41-306, the statute certainly fails to give fair notice.

In the present case, the State argued that it did not matter which defendant was the actual murderer since all four were equally guilty as principle or accessory. The tactics of the prosecution are well depicted in the State's closing argument set forth in the transcript at TR 4250-4289. The State argued to the jury that it did not matter who fired the fatal shot, that it did not matter who the triggerman was, extreme indifference to the value of human life while these four defendants were in the prosecution of one of those felonies set forth in the statute (Appendix F 2, Ark. Stat. Ann. 41-1501) which defines capital felony murder. (TR. 4254, 4277, 4278, 4280, 9283)

The Jury Instructions and Verdict Forms utilized in this case are those prescribed in Arkansas Model Jury Instructions (Criminal). It should be noted that the Model Jury Instructions do not require the jury to indicate whether or not a particular defendant is the one who did the actual killing. Not requiring the jury to find that a particular defendant is the one who actually did the killing is consistent with the prosecutor's argument in this case.

Appellant Clines argued below, "The imposition of the death penalty under Ark. Stat. Ann. Sec. 41-1501 does not deter a defendant who did not commit the homicide due to the fact that the defendant did not have the requisite intent to commit the crime, i.e., the specific intent to commit murder. The death penalty is capriciously imposed on those defendants who have the intent to commit one of the enumerated felonies but do not have the specific intent to commit homicide where one actually occurs." (TR. 83)

It appears that the trial court's interpretation of the stutate together with the various jury instructions and verdict forms was consistent with the Prosecutor's argument. Otherwise, the trial court would have been required to find that the capital felony murder statute failed to provide the requisite culpable mental state with regard to defendants who were not the actual killer or at least to find that various statements of co-defendants and other witnesses were exculpatory with regard to one or more of the various defendants and, therefore, necessitated a separate trial for each of those defendants whose participation in the actual killing may have been relatively minor.

The unconstitutionality of the lack of requirement of a culpable mental state obtains even in separate trials, if the trial court and prosecutor correctly interpreted the statute when they stated that: "It does not matter whether this defendant had the requisite culpable mental state but that all that is necessary in regard to his culpable mental state is that an accomplice caused the death of the victim under circumstances manifesting extreme indifference to the value of human life."

A finding that the imposition of the death penalty is unconstitutional in this case would be consistent with the holding in Henry v. State, 278 Ark. 478, 488 647 S.W. 2d 419 (1983). This is so because: (1) the state's evidence was without proof as to who fired the fatal shots except with regard to one of the co-defendants, and (2) the jury may have sentenced all four of the defendants to die out of passion and prejudice because the main actor in the murder could not be determined.

> "For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robberty, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing

or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

Because the Florida Supreme Court affirmed the death penalty in this case in the absense of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion." Enmund v. Florida 73 L Ed 2d 1140 (1154)

III.

THE USE OF A DEATH QUALIFIED JURY TO DECIDE THE GUILT AND PUNISHMENT OF PETITIONERS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

The current standard for selection of a death qualified jury was declared in Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its imposition." The appellant in Witherspoon had been convicted of murder and sentenced to die by a jury selected according to a state statute which excluded all prospective jurors who stated they had conscientious scruples against the death penalty or that they were opposed to the death penalty. While Witherspoon did not specifically so hold, it has been interpreted to mean that jurors who were irrevocably in favor of the death penalty should also be excluded. Thus, as had been stated in Hobbs v. State, 273 Ark. 125, 617 S.W. 2d 347 (1981): "It is only those jurors irrevocably committed to voting for or against the death penalty who should not sit." In Hobbs, the appellant's conviction for murder was reversed because the trial judge had, according to requirements of Witherspoon, improperly administered the voir dire of the prospective jurors.

The Witherspoon holding, as stated in Hobbs, eliminates certain sections of the community from the jury in capital cases. A cross-section of that portion of the population which is left is not impartial on the issues of guilt and punishment. As Justice Douglas pointed out in his separate opinion in Witherspoon, the nation's populace is becoming more and more opposed to the death penalty. As this trend continues the section of the community excluded for irrevocable opposition to the death penalty becomes proportionally

larger than the section excluded for irrevocable preference for the death penalty. This results in juries for capital cases which fail to represent a balanced cross-section of the community and which in fact represent a cross-section weighted towards conviction and towards imposing the death penalty.

Several studies have considered the question of whether a death qualified jury is impartial on the issues of guilt and punishment. A study by George L. Jurow, "New Data on the Effect of a 'Death Qualified Jury' on the Guilt Determination Process" 84 Harvard Law Rev. 567 (1971), is representative of these studies, and is of further value because it analyzes many of the previous studies and attempts to fill the gaps left by those studies.

Among the studies mentioned by Jurow is one by V. Boehm, "Legal Attitudes and Legal Decision-Making" (1966 doctoral dissertation, Columbia University). This study indicated that persons having an authoritarian personality were more apt to convict, regardless of the evidence presented. Jurow feels that Boehm's findings when considered in conjunction with a study by Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen", 42 U. Colo. L. Rev. 1 (1970), indicates that persons who favor capital punishment are also conviction prone. This is because a favorable attitude towards capital punishment is related to the attitudes held by authoritarian personalities, which were found to be conviction prone by Boehm. In addition to these studies, Jurow mentions several other studies which indicate that persons who favor capital punishment vote guilty more often than those who oppose captial punishment. This shows that reducing the pool from which a jury is selected can affect the jury's decision in an undesirable manner. The selection process proscribed by Hobbs has this effect.

Jurow hypothesized that favor or disfavor of the death penalty would result in greater rates of conviction and acquittal respectively. This hypothesis was borne out by the results of his study. The subjects were divided into five groups for analysis of the results of the study. The grouping was determined by the subject's attitude toward the death penalty. This attitude ranged from total opposition to the death penalty, group one, to total preference, group five. The study, which included viewing simulated cases and voting for guilt or innocence in those cases, determined that group one consistently voted for acquittal and that groups four and five consistently voted for conviction. Witherspoon and Hobbs dictate the exclusion of groups one and five as potential jurors. This leaves groups two, three and four as the pool from which the jury is selected in capital cases. Groups two and three exhibited neutrality in their voting, but group four voted consistently for conviction. According to the results in Jurow's study a jury selected in the manner prescribed in Witherspoon and Hobbs is not impartial.

Craig Haney, in a recent study, "Juries and the Death Penalty: Readdressing the Witherspoon Question" Crime and Delinquency 26(4):512-527 (1980), carries the argument further: "The consequences of the procedure are twofold: It has an effect on the composition of the jury panel that results, and the process itself affects those jurors who pass through it."

Regarding the composition of a death qualified jury, Haney points out that more blacks and women oppose the death penalty than whites and males. This results in a death qualified jury having fewer blacks and women and therefore is an unrepresentative jury. Haney also states that a death qualified jury is prosecution prone because of the correlation between attitude towards the death penalty and

and other attitudes as shown in the Bronson and Boehm studies. From this Haney argues that death qualified juries are more apt to convict because a prosecution prone jury will give more weight and credibility to the State's evidence.

Haney then turns to a further argument against the use of death qualified juries; the process of death qualification prejudices the jury selected against the defendant and increases the probability of conviction. In support of this position Haney points to several factors. During the selection of a death qualified jury the prospective jurors are repeatedly exposed to questioning in which guilt is assumed. The use of hypothetical questions during voir dire does not protect the defendant. It is inevitable that a prospective juror will associate the necessary assumption of guilt with the defendant in the particular case. This assumption stays in the juror's mind and is carried over into the actual trial. The repeated exposure to this line of questioning strengthens this assumption, and desensitizes the jurors to the magnitude and importance of the decision they may be forced to make. Thus when the decision as to penalty is made, it seems less awesome and will possibly be made with less consideration. Finally, Haney notes that when a person publicly states that they can do something, this makes it more likely that they will do it. Jurors who have publicly stated that they could impose the death penalty may find it difficult not to impose the death penalty.

The aforementioned studies show that a jury selected by the standard declared in Hobbs is not an impartial jury as required by the Sixth and Fourteenth Amendments to the Constitution. This position rests on three major points: First, the resulting jury is not selected from a neutral cross section of the community. Second, the personality type with predominates on a death qualified jury is biased in favor of the state. Because of this bias the jury is willing to give greater weight to the state's evidence.

Third, the selection process itself creates a bias in favor of conviction and in favor of imposing the death penalty.

Death qualifications during voir dire of the jury in the present case denied all defendants an impartial jury on the issues of guilt and innocence as required by the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, the convictions of all defendants in this case, on all counts, must be reversed.

The argument of Petitioners is supported by the decision in Grigsby v. Mabry, 569 F. Supp. 1273 (E. D. Ark. 1983). The Court in Grigsby concluded that the process, as used in these cases, of "death qualification" of prospective jurors suffers from two serious constitutional defects: first, it denies the accused a trial by jury representative of a cross section of the community; and second, it creates juries that are conviction prone. Id. 1275.

Where the defendant's right to a representative jury under the Sixth Amendment is violated, his conviction must be set aside. No harmless error analysis is permitted because the very integrity of the fact finding function of the jury is directly implicated. Id. 1323.

Associate Justice Purtle, dissenting, at Appendix A 17 expressed that he, two, is of the opinion that a death qualified jury is not composed of a cross section of the population as required by the Constitutions of Arkansas and the United States.

CONCLUSION

For the reasons hereinabove stated Petitioners pray that a Writ of Certiorari issue to review the decision of the Supreme Court of Arkansas.

Respectfully submitted,

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83-5849

SUPREME COURT OF ARKANSAS

No. CR82-54

HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY, and MICHAEL RAY ORNDORFF,

Appellants,

V.

STATE OF ARKANSAS,

Appellee.

Opinion Delivered JUL 5 1983

APPEAL FROM BENTON COUNTY CIRCUIT COURT

HONORABLE WILLIAM H. ENFIELD, Circuit Judge

Affirmed.

STEELE HAYS, Associate Justice

These four appellants were jointly tried and convicted of the January 8, 1981 capital murder of Don Lehman, a Rogers householder, and of the aggravated robbery of his wife and daughter. They were sentenced to death by electrocution on the capital murder charge and to life sentences on the two aggravated robbery charges. On appeal they allege a number of errors of law and procedure as grounds for reversal. Finding no error, we affirm the convictions and the sentences imposed.

I.

THE TRIAL COURT ERRED IN FINDING THE ARKANSAS CAPITAL MURDER STATUTE CONSTITUTIONAL.

Appellants make a four-fold attack on the constitutionality of the Arkansas felony murder statute, Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977), which provides that capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Appellants argue that the statute is vague and overbroad; that it denies equal protection of the law inasmuch as there are currently twenty-three men, but no women, on death row; that the imposition of the death penalty is arbitrary and capricious because the prosecuting attorney is given discretionary power to waive the death penalty and because the jury must return a death verdict if they

find aggravating circumstances outweigh mitigating circumstances; and finally that our statutory scheme does not require the jury to consider the culpability of each individual defendant.

The vagueness argument has been raised and answered more than once. In Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980), we pointed out that in the definition of criminal offenses some generalizatio is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses. (See Cromwell at p. 107).

The claim that the equal protection clause of the constitution is offended because men are given the death penalty disproportionately to women is raised initially on appeal and, beyond that, is supported by argument alone.

We disagree that juries are bound under our statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances. We have pointed out in several cases that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. (See Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981) and Ark. Stat. Ann. §41-1302(2)(c)). Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. Wilson v. State, 271 Ark. 682, 611 S.W.2d 739 (1981) This jury had that option.

The argument that prosecutorial discretion in seeking the death penalty is arbitrary and capricious has been dealt with by the Supreme Court of the United States (Bordenkircher v. Hayes, 434 U.S. 359 (1978)); and by us (Miller v. State, 269 Ark. 341, 605 S.W.2d 430

(1980)). It needs no further review.

The claim that our statutory scheme does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, might be disposed of on procedural grounds, as the argument was not clearly raised below, i.e. we find no objection to the capital murder instructions, nor did the appellants tender to the trial court an instruction consistent with their view of the law. Schwindling v. State, 269 Ark. 388, 602 S.W.2d 639 (1980). However, we choose to consider the merits of the argument.

Appellants cite Enmund v. Florida, ___U.S.___, 73 L Ed 2d 1140, 102 S.Ct.____,(1982). There, the Supreme Court held that death was a cruel and unusual punishment for one who had participated in a robbery during which murders were committed, but was not present at the killings and did not intend that the victims be killed. The court noted that the record supported no more than an inference that Enmund, the petitioner, was the person waiting in a car near the scene of a robbery. Two others had gone to the rear of a nearby farmhouse and, on a pretext of having car trouble, coaxed the victim outside to rob him. When the victim called for help his wife came out and shot one of the robbers. The two victims were killed in a gun battle and the robbers fled with their money to a waiting car.

Relying on the Eighth Amendment, the court held that one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, is not subject to the death penalty. A Florida jury had found Enmund and a co-defendant guilty and recommended the death penalty for both defendants, which the trial court imposed. Acknowledging the absence of any direct evidence that Enmund was present at the killings, the Supreme Court of Florida affirmed, explaining that the interaction of the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons. As it did

with death as a penalty for rape (see Coker v. Georgia, 433 U.S. 584 (1977)), the court reasoned that an overwhelming number of states and of American juries would repudiate the death penalty for crimes such as Enmund's.

Significant comments are in the opinion, first, that there was no evidence that Enmund had any intention of participating in, or facilitating, a murder and, second, the court emphasized that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Here, a number of distinguishing factors immediately appear. At about 9:45 p.m., after he and his family had retired for the evening, Don Lehman answered a knock at his front door. He asked who was there and someone answered "David." His daughter, Vickie, also responding to the knocking, said as her father unlocked the door the four appellants, masked and armed, burst into the room with such force that her father was knocked backward off his feet and the doorknob of the front door was jammed through a closet door behind Two or three of the appellants struggled with her father toward the bedroom, where Mr. Lehman was wrestled onto the bed and a fatal shot to the head and one to the abdomen were delivered.

There was direct evidence from more than one source that appellants had discussed among themselves the necessity of murder if they met resistance; at least two of the appellants were armed with pistols, perhaps three of them, and the fourth with a lethal weapon fashioned from a metal chain. All four wore ski masks and all four burst into the Lehman home when the latch was opened. The proceeds, some $1,200, were presumably divided to the appellants' liking. It must be noted, too, that Lehman was given no opportunity to yield, he was immediately attacked by appellants, sustaining blows to his head and face from the metal chain and a mortal wound to the chest before reaching the bedroom.

Although perhaps only two of the appellants were in the bedroom

when Mr. Lehman was killed, it cannot be ignored that when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence. We think the likelihood of a homicide under the circumstances is so substantial as to bring this case clearly within the quoted exception of the Enmund decision, on those circumstances alone. Added to that is the evidence that murder was plainly contemplated by the appellants. We conclude the blame for Don Lehman's murder rests with near equality on all of the appellants.

As a final response to this phase of the argument, we point out that there are added safeguards in our system against the arbitrary imposition of the death penalty. In Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence where it is imposed capriciously (see Sumlin v. State, 273 Ark. 185, 617 S.W.2d 372 (1981)), or where the culpability of co-felons is disproportionate (see Henry v. State, 278 Ark. 478, ___ S.W.2d ___ (1983), or where death is unduly harsh under the circumstances (Neal v. State, 274 Ark. 217, 623 S.W.2d 191 (1981) and Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977).

We are not overlooking the suggestion that Michael Orndorff's participation in the crime was half-hearted; that he may have asked to be taken home as the appellants were leaving the Baker residence; and that after the shooting he disclaimed any wish to be involved in a murder. But the jury unanimously rejected as a mitigating factor that any appellant played a minor role. Too, Orndorff's request to be taken home may have been due to Steve Baker's having declined to go along, rather than because of any compunctions over the undertaking. And his belated comment

antagonistic, but that claim cannot be supported. We find no effort among the defendants to point to another defendant as the murderer; the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred. These defenses are not in the least antagonistic in the same sense as in McDaniel.

The final and essential difference is that the McDaniel case had the added element that where culpability was distinctly disproportionate, the jury was admittedly unable to decide which of the two defendants committed a heinous act, resulting in two defendants being convicted of a capital crime for which only one may have been guilty. Whereas here, there is substantial evidence, indeed overwhelming evidence, that all four appellants planned and executed a robbery, expressly deliberating on murder as a possible consequence. Nothing in this record suggests that for these appellants to be tried jointly resulted in substantial injustice and we find no abuse of discretion in the trial court's refusal to grant separate trials.

III.

THE USE OF A DEATH QUALIFIED JURY IN THE INSTANT CASE DENIED THE APPELLANTS AN IMPARTIAL JURY ON THE ISSUES OF GUILT AND PUNISHMENT AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The gist of this argument is that when those members of a jury panel holding religious or conscientious scruples against capital punishment are eliminated, the cross-section of the population which remains is not impartial and unbiased on the issues of guilt and punishment. They are, it is urged, favorable to the prosecution and, hence, guilt prone. The argument is not new and needs no reiteration. It has been considered and rejected here as well as in the Supreme Court of the United States. Witherspoon v. Illinois, 391 U.S. 510 (1968); Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980).

IV

THE JURY SELECTED IN THE INSTANT CASE WAS NOT SELECTED IN ACCORDANCE WITH THE STANDARD PRESCRIBED IN WITHERSPOON AND HOBBS.

The Witherspoon rule, as interpreted in Hobbs v. State, 273 Ark. 125, 617 S.W.2d 347 (1981) permits the exclusion of persons as prospectiv jurors only if they irrevocably oppose or favor the death penalty regardless of the evidence. Appellants insist that two of the veniremen, Mrs. Kaiser and Mrs. Dick should not have been excused for cause because of their uncertainty as to capital punishment and Mr. Harley Wood, who showe some preference for it, should have been excused for cause.

We have examined the questions asked in voir dire and the response given and, typically, no clear conclusion can be drawn. The answers are tentative or equivocal, and the trial court is in a better position than we are to gauge the attitude of the veniremen and decide whether each wil weigh the evidence and, if appropriate, will consider all the penalties provided by law. We cannot say his discretion was used wrongly in any instance complained of. Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980); McCree v. State, 266 Ark. 465, 585 S.W.2d 938 (1979).

V.

THE TRIAL COURT ERRED IN LIMITING THE APPELLANTS TO A TOTAL OF TWELVE PEREMPTORY CHALLENGES.

The trial court limited the four defendants to a total of twelve peremptory challenges, which they claim is error. We have held in three cases that where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all. Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1979); Lewis v. State, 220 Ark. 914, 251 S.W.2d 490 (1952); Hearne v. State, 121 Ark. 460, 181 S.W.2d 291 (1915).

No absolute right to peremptory challenges exists under the constitution. Stilson v. United States, 250 U.S. 583 (1919) and we see no prejudice resulting from the position we have taken in the earlier decisions. The right to challenge a prospective juror on peremptory grounds may be exercised simply because counsel has reservations that certain groups might be skeptical of its theory of the case; it is a very

general response and such criteria as occupation, education, age, residenc social background, sex, and even facial expression, may influence its use, depending on the nature of the case. But ordinarily these considerations are applicable to the defendants as a whole and not individually. Here, it appears the peremptory challenges were exercised collectively by the defense, as might be expected, and no argument is offered that for a specific reason one prospective juror was objectionable to one of the defendants, though not to the others. We adhere to our holding in Williams v. State, supra.

VI.

CALLING A FIVE DAY RECESS AT THE CLOSE OF TESTIMONY WAS AN ABUSE OF THE COURT'S DISCRETION.

Appellants allege that it was an abuse of discretion for the trial court to order a five day recess as the trial was nearing a close. The recess occurred, evidently, between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council. The trial seems to have commenced well in advance of the meeting, but moved at a slower pace than expected. Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar. We see no reason why it would work to the appellants' greater prejudice to recess from Wednesday to Monday, than from Friday to Monday, as often occurs in trials. We find no abuse of discretion.

VII.

IT WAS ERROR FOR THE JURY TO FIND THE AGGRAVATING CIRCUMSTANCE THAT, "IN THE COMMISSION OF THE CAPITAL MURDER, EACH OF THE APPELLANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO A PERSON OTHER THAN THE VICTIM."

Citing Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981), appellants contend that because Vickie Lehman and Virginia Lehman were victims of the underlying felony of aggravated robbery to the capital murder of Don Lehman, the evidence will not warrant a finding as an aggravating circumstance that appellants knowingly created a great

risk of death to a person other than the victim. Appellants assert that Williams v. State, supports the argument, but fail to explain how. The holding there has no particular relevance to this case. Williams' death sentence was reduced because one of the aggravating circumstances found by the jury, commission of a prior felony, did not involve violence as required by Ark. Stat. Ann. §41-1303 (Repl. 1977). The decision also holds that where a jury finds no mitigating circumstances and three aggravating circumstances, one of which is erroneous, we will not regard the error as harmless simply because two aggravating circumstances remain, as we are not in a position to speculate as to what a jury would do on a finding of two aggravating factors instead of three.

The appellee submits that this point was not preserved by an objection to the instructions or to the verdict forms. Without implying ths the point is otherwise meritorious, we decline to consider it for the lack of proper objections.

VIII.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AND ACTS AGAINST APPELLANTS CLINES AND ORNDORFF.

Mrs. Tammy Baker was called by the state to prove that the appellar had been at her home the evening of the Lehman murder, drinking beer and playing cards with her husband, Steve Baker. She said when she answered the door the four appellants were there, that one was wearing a ski mask and stuck a gun in her face. She was ordered to "stick 'em up", before realizing that a joke was being played. The four stayed until about 9:30 p.m. and she overheard discussions involving the robbery of someone who lived nearby.

On cross-examination she was asked by counsel for one of the defendants, Clines, whether her husband was then facing charges of robbery committed the night before the Lehman crime. She said he was and was then asked if any of the appellants were involved and she said Orndorff and Clines were. Orndorff's objections to this line of question

were overruled and when Steve Baker followed his wife to the stand the state was permitted to go into the incident in greater detail.

Appellants Clines and Orndorff complain that the admission of this evidence, as well as a statement by Billy Weaver that Darrell Richley told him he was the one who shot Don Lehman, that he had been involved in "stealing and robbing", violate the rule against admitting evidence of prior bad acts, citing, Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954). But the Weaver comment was admitted with an admonition to the jury in accordance with the purposes of Rule 404(b), Uniform Rules of Evidence, and the Baker testimony has to be examined in light of the fact that it was Clines' lawyer who pointedly asked the questions that brought the evidence into the trial. Whether the object was to discredit Tammy and Steve Baker's testimony by showing that Baker was charged with similar conduct is speculation, but we are not persuaded that reversible error occurred. It is entirely possible that the evidence would have been received by the trial court under Rule 404(b) had it been offered for the purpose of proving identity, opportunity, intent, preparation, or absence of mistake. Certainly the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value. The prejudicial aspect is not so obvious that we can say the court was clearly wrong.

IX.

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY, IN THE SENTENCING PHASE, TO FIND APPELLANTS CLINES AND ORNDORFF HAD "PREVIOUSLY COMMITTED ANOTHER FELONY, AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON" ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

After the appellants' guilt had been established and the penalty phase of the trial was in progress the state was permitted to prove one of the seven aggravating circumstances listed in Ark. Stat. Ann. §41-1303 (Repl. 1977) by the testimony of Steve Baker that he, Clines and Orndorff had previously committed another felony by the use or threat of violence. Baker said the three of them robbed Barry Cobbs and Tim Pettyjohn at

gunpoint on January 7, 1981.

Appellants charge that since Steve Baker was an accomplice in the alleged robbery the penalty procedure violated the rule incorporated in Ark. Stat. Ann. §43-2116, that a conviction cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence. As Steve Baker's testimony was not corroborated, appellants claim that error resulted. The argument cannot be sustained, if for no other reason than the fact that §43-2116 deals with grounds for conviction, whereas §41-1303 deals with proving that a crime of violence was previously committed. Beyond that, in Miller v. State, supra, we held that the same degree of proof is not required to sustain a finding that an aggravated or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. (Miller at p. 355). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

X.

THE TRIAL COURT ERRED IN ADMITTING THE TENNIS SHOES OF THE APPELLANT CLINES.

We need not delay unduly with the issue raised by this argument, as the admission of the evidence itself was of little or no consequence. An investigating officer testified that he took an impression of a foot print from a flower bed of the Lehman home; that there was a high degree of probability that it matched Hoyt Clines' tennis shoe, however, he said it was impossible to be absolutely certain. But Clines' presence at the scene in company with the other appellants was amply evidenced by other proof and no objection to this evidence was offered until the trial, as required by A.R.Cr.P. Rule 16.2.

XI.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL FOR TESTIMONY CONCERNING IMPLICATING OUT-OF-COURT STATEMENTS OF A CO-DEFENDANT, DARRYL V. RICHLEY, REGARDING APPELLANT CLINES.

Freddie Barker was called by the state to prove that Darryl

Richley came to his home a day or two after the crime involving the Lehman family to ask his help in selling the guns taken from the Lehman home. Richley, he said, talked about his part in the murder, and told him four of them went to the door with ski masks and "busted on in", that one of the four started whipping Lehman with a motor chain belt, who made a break for the bedroom "and the guy pulled his mask off and kept hitting him. He said he got on the bed and that [Richley] shot him and said the guy kept going for a gun above the bed and he said he put the gun up to his head and shot him." The questioning continued at length, with no other reference to the removal of a mask, and not until the state fully completed its interrogation was any objection made. At that point counsel for Hoyt Clines moved for a mistrial on the grounds that there was previous testimony that it was Clines who had removed his mask and hence Clines was deprived of his right to confront opposing witnesses. This argument lacks merit, as objections must be timely, Earl v. State, 272 Ark. 5, 612 S.W.2d 98 (1981), and mistrials should be declared only when the trial court is certain the trial cannot, in fairness, continue. Floyd v. State, 278 Ark. 86, ____S.W.2d____(1982).

XII.

THE EVIDENCE OBTAINED FROM THE SEARCH OF APPELLANT RICHLEY'S CAR AND APARTMENT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE AND THE CONSENT TO SEARCH GIVEN BY RICHLEY WAS NOT GIVEN VOLUNTARILY.

Appellant Richley urges that the affidavit for the search warrant was deficient in that no underlying circumstances for the affiant's conclusions were stated. He also argues that his consent was not voluntary. However, the search warrant and affidavit are not abstracted, as required by our rules, and the trial court found the appellant did give a lawful consent to the search. An independent determination of that issue has been made on review and we are satisfied the trial court's finding was entirely consistent with the evidence, particularly in view of Richley's testimony.

Finally, under A.R.Cr.P. Rule 36.24, and our rule 11(f), we find

the treatment of other objections of appellants which were overruled, as well as rulings adverse to appellants, do not constitute reversible error. On a comparative basis we are not disposed to say the death penalty in this case is so wantonly, arbitrarily or freakishly imposed, or so excessive in relation to the crime, that we are compelled to modify the verdicts. There was sufficient evidence to support the findings of aggravating circumstances which were not outweighed by mitigating circumstances. We are satisfied the jury's verdict was relatively free of passion or prejudice. Accordingly, the judgments and sentences are affirmed.

PURTLE J. DISSENTS, DUDLEY, J., CONCURS IN PART AND DISSENTS IN PART.

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83-5849

SUPREME COURT OF ARKANSAS

No. CR 82-54

HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY, and MICHAEL RAY ORNDORFF,
APPELLANTS

V.

STATE OF ARKANSAS,
APPELLEE

Opinion Delivered JUL 5 1983

APPEAL FROM BENTON CIRCUIT COURT
WILLIAM H. ENFIELD, Judge

DISSENTING IN PART
CONCURRING IN PART

ROBERT H. DUDLEY, Associate Justice

The State adduced overwhelming evidence that the four appellants were guilty of jointly committing a capital murder and two robberies. Their individual defenses were not mutually antagonistic. Although the charges were joined and the appellants were jointly tried, the appellants as well as the State were afforded a just and fair proceeding through the accusatorial phase of the bifurcated capital murder trial.

However, that holding does not mandate the conclusion that the due process protections were sufficiently afforded at the joint sentencing phase of the capital murder trial. The two phases of the bifurcated trial serve vastly differing purposes. The essence of the accusatorial phase is the formal adversary presentation of evidence relative to guilt. The adversary concept places the State and the accused on an equal footing and so, in fairness to the State, joint trials are oftentimes required through this stage. Markedly different, the essence of the sentencing phase is the search for relevant information to choose which of the two penalties, life without parole or death, is appropriate for the person already found guilty. This second phase search for information is not based upon the same adversary concept. Our applicable statute

provides that mitigating circumstances may be presented regardless of their admissibility under the rules of evidence while aggravating circumstances may be presented only when they are admissible under the rules of evidence. Ark.Stat.Ann. § 41-1301(4)(Repl. 1977). The underlying reason for this is that the penalty of death is qualitatively different from all other punishments.

When the death penalty is sought, justice demands individual, not joint, sentencing. It is for this same reason that mandatory death sentences for particular crimes have been declared unconstitutional. Gregg v. Georgia, 428 U.S. 153 (1976). It is only after a structured exercise of discretion which guarantees individualized sentencing that the death sentence may be imposed. Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Accordingly, after a finding of guilty of capital murder, juries in this State may impose a sentence of death only after considering aggravating and mitigating circumstances. Ark.Stat.Ann. §§ 41-1301 & 1302 (Repl. 1977). Aggravating circumstances are principally related to the personal history of the individual defendant and not to the nature of the crime committed. Ark.Stat.Ann. § 41-1303 (Repl. 1977). Mitigating circumstances are totally related to the personal background of the defendant. Id. Individualized sentencing requires structured detailed consideration of the personal history of the guilty person before the death sentence may be imposed. Any impediment to that individualized exercise of discretion is violative of the protection of due process.

The clear issue is whether the joint sentencing procedure used in this case afforded each appellant the structured and detailed consideration of his individual background which is required before the sentence of death may be imposed. Surely no one can doubt that when the jury was sent out of the courtroom to fix the punishment for four equally guilty persons at one sitting,

83-5849

SUPREME COURT OF ARKANSAS

HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY, and MICHAEL RAY ORNDORFF,

APPELLANTS,

V.

STATE OF ARKANSAS,

APPELLEE.

No. CR 82-54

Opinion Delivered JUL 5 1983

APPEAL FROM BENTON COUNTY CIRCUIT COURT; HON. WILLIAM H. ENFIELD, JUDGE.

DISSENT

JOHN I. PURTLE, Associate Justice

I believe at least one of the appellants, Michael Orndorff, was prejudiced by the trial court's refusal to give him a separate trial. To grant him a separate trial would have in no way selectively excluded him from culpability in regard to the crime for which he was convicted. In fact it seems to me that holding him to trial with the actual murderers practically insured his conviction. Guilt by association is a common human error and in this case I have no doubt it played a big part in the minds of the jury who meted out identical convictions and uniform penalties to all four appellants.

When each of the appellants attempted to place himself outside the bedroom where decedent was shot the result was that each defendant put before the same jury a defense inconsistent with the other defendants' defenses.

The majority opinion seems to infer some type of guilt from some of the appellants' failure to testify. If the trial court did this we would vote unanimously to reverse and remand. The trial court should have granted a severance.

A total of twelve peremptory challenges were allowed the four defendants. One of them did not get to exercise a single peremptory challenge. Had they been tried separately each would have been

allowed twelve challenges. Therefore, these appellants were denied rights which are extended to others tried separately on identical charges. There is nothing to prevent a trial judge from allowing more than twelve peremptory challenges if fairness and impartiality demand it.

Furthermore, it was clearly prejudicial to allow evidence of crimes for which the appellants had not been convicted even though this was during the sentencing phase of the bifurcated trial. What happened to the old law that held every individual is presumed innocent? Soon it will be legal for the state to charge an accused of spurious crimes in order to help secure a conviction. For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase.

I am still of the opinion that a death qualified jury is not comprised of a cross-section of the population as required by the Constitutions of Arkansas and the United States. It appears to me that there is a misunderstanding of the Witherspoon doctrine when prospective jurors are excluded because of religious or moral scruples against the death penalty. Perhaps some member or members of this very court have religious or moral scruples against the death sentence, yet we affirm such sentences if we find no reversible error. One who does not believe in the death sentence may honestly and conscientiously vote for such a sentence in upholding the law. For these reasons I must dissent to the majority opinion.

that after fixing the penalty for the first three at death, there was a great reluctance to give the fourth a lesser sentence. Such reluctance alone might arbitrarily mandate a fourth death penalty for the particular crime regardless of the guilty person's personal history. This impediment to the individual exercise of discretion violates due process and the prohibition against arbitrary death sentences.

Such a scenario may well have occurred in the case at bar. In the sentencing phase appellant Clines was shown to have pleaded guilty in 1978 to burglary, a non-violent crime. No other convictions or felonious actions were shown to have been committed by him during this stage of the trial. The only other proof of a prior bad action, for which there was no conviction, came during the accusatorial phase of the trial when an accomplice gave uncorroborated testimony on a collateral matter. Yet, he, too, was given the death sentence.

For this reason I dissent from that part of the well written majority opinion which affirms the joint proceeding to fix the punishments at death. I concur in that the part of the opinion affirming the life sentences for the aggravated robberies.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

DONA L. WILLIAMS
CLERK

ROBIN HENDERSON
CHIEF DEPUTY

LESLIE W. STEEN
DEPUTY

JANIE OWEN
DEPUTY

VERNON L. DUTTON
DEPUTY

MELISSA FULLER
DEPUTY

DENISE SELBY
DEPUTY

October 3, 1983

Donald R. Huffman
Public Defender's Office
Benton County Courthouse
Bentonville, AR 72712

Re: CR82-54 Hoyt Franklin Clines et al
v. State of Arkansas

Dear Mr. Huffman:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied.
Dudley, J., would grant."

Sincerely yours,

Dona L. Williams

Dona L. Williams, Clerk

DLW:rh

cc: Marshall N. Carlisle
Priscilla Karen Pope
Thomas J. Tucker
Bill Clinton, Governor
Steve Clark, Attorney General

Appendix B

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS — PLAINTIFF

VS. NO. CR-81-20

HOYT FRANKLIN CLINE, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY, and MICHAEL RAY ORNDORFF — DEFENDANTS

JUDGMENT AND COMMITMENT

NOW on this 28th day of September, 1981, this cause coming on to be heard, the State appearing by David Clinger, Prosecuting Attorney, and the Defendants, Hoyt Franklin Cline, James William Holmes, Darryl V. Richley, and Michael Ray Orndorff, appearing in person and by their attorneys, Don Huffman, Paul Davidson, Marshall Carlisle, Carol Roddy, Roger Carlin, and John Jennings, and Defendants, having been previously arraigned and entered their pleas of NOT GUILTY to the charge of Capital Murder - Class A Felony, all parties announced ready for trial on the 28th day of September, 1981, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court and the arguments of counsel, retired to consider its verdict. The trial having lasted twenty days, the jury, on the 27th day of October, 1981, returned into court a verdict of guilty and fixed their punishment at death by electrocution. Defendants come on now on this 30th day of October, 1981, ready for sentencing.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the Defendants, Hoyt Franklin Cline, James William Holmes, Darryl V. Richley, and Michael Ray Orndorff, are guilty as charged, and that they be and hereby are sentenced to death by electrocution. Defendants are advised by the Court that they may appeal this decision by filing notice of appeal within thirty days.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendants, Hoyt Franklin Cline, James William Holmes, Darryl V. Richley, and Michael Ray Orndorff, be remanded to the custody of the Sheriff of Benton County, Arkansas, and by him safely and speedily delivered to the Department of Correction, and shall remain there until April 30, 1982, on which date they shall be put to death by electrocution.

IT IS FURTHER ORDERED that the Clerk of this Court deliver a certified copy of this Judgment and Commitment to said Sheriff to be by him delivered to the authorized representative of the Department of Correction as authority to receive the Defendants at the State penitentiary.

CIRCUIT JUDGE

ENTERED: October 30, 1981.

FILED
At 10:30 O'Clock A M.
OCT 30 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK

Appendix C

ACT 470

AN ACT to Empower the Supreme Court of the St[illegible] of Arkansas to Prescribe Rules of Pleading, Pra[illegible] tice, and Procedure in Criminal Cases and Proce[illegible] ings in All Inferior Courts of Law in the State [illegible] Arkansas; to Preserve the Right of Appeal but A[illegible] thorize the Supreme Court to Make Rules Prescr[illegible] ing Time for and Manner of Taking Appeals; [illegible] Prescribe the Procedure for Effectuating S[illegible] Rules; to Repeal All Laws in Conflict With S[illegible] Rules as May Be Prescribed by the Supreme C[illegible] of Arkansas; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. The Supreme Court of the state of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in criminal cases and proceedings to punish for criminal contempt of court in all the inferior courts of law in this state.

SECTION 2. The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals.

SECTION 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending.

SECTION 4. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

SECTION 5. Nothing in this act, anything therein to the contrary notwithstanding, shall in any way limit, supercede, or repeal any such rules heretofore prescribed by the Supreme Court.

SECTION 6. EMERGENCY CLAUSE. The General Assembly finds that pleading, practice, and procedure in criminal cases and proceedings in the inferior courts of law of this state is not efficient, certain, or responsive to the reasonable expectations and legitimate needs of the people of this state; that the system of administering criminal justice in the state of Arkansas is in need of immediate reform; and, that the immediate passage of this act is necessary to empower the Supreme Court of the state of Arkansas, which the General Assembly finds to be the proper authority for prescribing rules of pleading, practice, and procedure in criminal cases and proceedings in the courts of this state, to effectuate such needed reforms. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after March 1, 1971.

APPROVED: April 1, 1971.

Appendix D

83-5849

21-964

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS — PLAINTIFF

VS. NO. CR-81-73

DARYL RICHLEY — DEFENDANT

ORDER

NOW on this 7th day of December, 1981, comes on for consideration the captioned cause, and the Court, being well advised in the premises, finds that the Motion of the Prosecuting Attorney for a nolle prosequi of the captioned cause should be approved.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT that the charges against Daryl Richley in this cause be and hereby are nolle prossed.

CIRCUIT JUDGE

ENTERED: Dec. 7, 1981.

I, Josephine R. Heyland, certify this instrument is a true copy of the Order CR 81-73 State of Ark. vs Daryl Richley on file in this office, dated Dec 7, 1981 Circuit Book C at page 964

Josephine R. Heyland, Clerk

By Carol Cook D.C.

FILED
At 1610 O'Clock 4 M.
DEC 8 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

Appendix E

INFORMATION

CR 81-73

IN THE BENTON COUNTY CIRCUIT COURT

THE STATE OF ARKANSAS
vs.

INFORMATION FOR

DARYL RICHLEY | AGGRAVATED ROBBERY-Class A Felo
and USE OF A FIREARM

I, DAVID S. CLINGER, PROSECUTING ATTORNEY WITHIN AND FOR THE 19th JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Benton County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant Daryl Richley

of the crime of Aggravated Robbery-Class A Felony & Use of a Firearm committed as follows, to-wit: The said defendant on or about the 30th day of October, 19 79, in Benton County, Arkansas, did unlawfully,

with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another and he is armed with a deadly weapon or represents by word or conduct that he is so armed, to-wit: Spe Dee Mart #12, Rogers, Arkansas,

In the commission of the above felony, did use a firearm, to-wit: revolver,

F I L E D
At 3:45 O'clock P M.
FEB 24 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

I, Josephine R. Heyland, certify this instrument is a true copy of the Information State of Ark. vs Daryl Richley on file in this office, dated Feb. 24, 1981 Book ____ page ____ CR 81-73
Josephine R. Heyland, Clerk
By Carol Cook D.C

against the peace and dignity of the State of Arkansas.

DAVID S. CLINGER
Prosecuting Attorney
BY: Ray Smith
Deputy Prosecuting Attorney

Subscribed and sworn to before me this 24 day of February 1981
Josephine R. Heyland
Circuit Clerk

Admit to bond in the Sum of $ _____ By Pat Wigington
Deputy Circuit Clerk

2-965

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-81-74

DARYL RICHLEY and JAMES WILLIAM HOLMES DEFENDANTS

ORDER

NOW on this 7th day of December, 1981, comes on for consideration the captioned cause, and the Court, being well advised in the premises, finds that the Motion of the Prosecuting Attorney for a nolle prosequi of the captioned cause should be approved.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT that the charges against Daryl Richley and James William Holmes in this cause be and hereby are nolle prossed.

CIRCUIT JUDGE

ENTERED: Dec. 7, 1981.

I, Josephine R. Heyland, certify this instrument is a true copy of the Order CR 81-74 State of Ark. vs Daryl Richley & James William Holmes on file in this office, dated Dec 7 19 81 Circuit Book U at page 965

Josephine R. Heyland, Clerk

By Carol Cook D.C

FILED

At 10:10 O'Clock A M.

DEC 8 1981

JOSEPHINE R. HEYLAND

Clerk and Recorder

BENTON COUNTY, ARK.

INFORMATION

IN THE BENTON COUNTY CIRCUIT COURT

THE STATE OF ARKANSAS

vs.

INFORMATION FOR

CR 81-74

DARYL RICHLEY AND JAMES WILLIAM HOLMES — AGGRAVATED ROBBERY-Class A Felo: and USE OF A FIREARM

I, David S. Clinger, PROSECUTING ATTORNEY WITHIN AND FOR THE 19th JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Benton County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendants ~~Daryl Richley & James William Holmes~~

of the crime of Aggravated Robbery-Class A Felony & Use of a Firearm committed as follows, to-wit: The said defendant on or about the ~~17th~~ 19th day of ~~April~~ February, 19 ~~80~~ 81, in Benton County, Arkansas, did unlawfully,

with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another and he is armed with a deadly weapon or represents by word or conduct that he is so armed, to-wit: Wrangler Drive Inn, Rogers, Arkansas,

In the commission of the above felony, did use a firearm, to-wit: revolver,

FILED
At 3:45 O'clock P.M.
FEB 24 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

I, Josephine R. Heyland, certify this Instrument is a true copy of the Information Date of Daryl Richley & James William Holmes on file in this office, dated Feb. 24, 1981 Book — in file — page CR 81-74

Josephine R. Heyland, Clerk

By Carol Carder D.C

against the peace and dignity of the State of Arkansas.

DAVID S. CLINGER
Prosecuting Attorney

BY: Ray Brown
Deputy Prosecuting Attorney

Subscribed and sworn to before me this 24 day of February 19 81

Josephine R. Heyland
Circuit Clerk

Admit to bond in the Sum of $_____

By Bernice Wheaton
Deputy Circuit Clerk

4-966

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS — PLAINTIFF

VS. NO. CR-81-75

DARYL RICHLEY and
JAMES WILLIAM HOLMES — DEFENDANTS

ORDER

NOW on this 7th day of December, 1981, comes on for consideration the captioned cause, and the Court, being well advised in the premises, finds that the Motion of the Prosecuting Attorney for a nolle prosequi of the captioned cause should be approved.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT that the charges against Daryl Richley and James William Holmes in this cause be and hereby are nolle prossed.

H. J. Enfield
CIRCUIT JUDGE

ENTERED: Dec. 7, 1981.

FILED
At 10:10 O'Clock A M.
DEC 8 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

I, Josephine R. Heyland, certify this instrument is a true copy of the Order in 81-75 State vs Daryl Richley & James William Holmes on file in this office, dated Dec 7 1981 Circuit Book 11 at page 466

Josephine R. Heyland, Clerk
By Carol Cook D.C.

INFORMATION

IN THE BENTON COUNTY CIRCUIT COURT

CR 81-75

THE STATE OF ARKANSAS

vs.

INFORMATION FOR

DARYL RICHLEY & JAMES WILLIAM HOLMES — AGGRAVATED ROBBERY-Class A Felony and USE OF A FIREARM

I, David S. Clinger, PROSECUTING ATTORNEY WITHIN AND FOR THE 19th JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Benton County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendants Daryl Richley & James William Holmes

of the crime of ~~Aggravated Robbery-Class A Felony & Use of a Firearm~~

committed as follows, to-wit: The said defendant on or about the fifth day of November, 19 80, in Benton County, Arkansas, did unlawfully,

with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another and he is armed with a deadly weapon or represents by word or conduct that he is so armed, to-wit: Cherokee Self Service Gas Station, Rogers, Arkansas,

In the commission of the above felony, did use a firearm, to-wit: revolver,

FILED
At 3:45 o'clock P.M.
FEB 24 1981
JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

I, Josephine R. Heyland, certify this instrument is a true copy of the Information Daryl Richley & James William Holmes on file in this office, dated Feb 24 1981 Book — at page CR 81-75

Josephine R. Heyland, Clerk
By Carol Cox D.C.

against the peace and dignity of the State of Arkansas.

DAVID S. CLINGER
Prosecuting Attorney

BY: Ray Burnett
Deputy Prosecuting Attorney

Subscribed and sworn to before me this 24th day of Feb, 19 81

Josephine R. Heyland
Circuit Clerk

Admit to bond in the Sum of $ ____

By Carol Cox
Deputy Circuit Clerk

41-1301. Trial of persons charged with capital murder. - The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 (§ 41-1302); except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 (§ 41-1303), or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 (§ 41-1303) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing. (Acts 1975, No. 280, § 1301, p. 500.)

41-1501. Capital Murder. - (1) A person commits capital murder if:

(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(b) with the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, fireman, judge or other court official, probation officers, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or

(c) with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(d) with the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or a candidate for public office, he causes the death of any person; or

(e) while under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliberation; or

(f) pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person; or

(g) he enters into an agreement whereby one person is to cause the death of another person in return for anything of value, and the person hired, pursuant to the agreement, causes the death of any person.

(2) It is an affirmative defense to any prosecution under subsection (1)(a) for an offense in which defendant was not the only participant that the defendant did not commit the homicide act or in any way solicit, command, induce, procure, counsel, or aid its commission.

(3) Capital murder is punishable by death or life imprisonment without parole pursuant to chapter 13(§§ 41-1301-41-1309). For all purposes other than disposition under Article III (§§ 41-801 - 41-1309), capital murder is a Class A felony. (Acts 1975, No. 280, § 1501, p. 500.)

83-5849

RECEIVED
DEC 2 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

HOYT FRANKLIN CLINES,
JAMES WILLIAM HOLMES,
DARRYL V. RICHLEY and
MICHAEL RAY ORNDORFF

Petitioners

V.

STATE OF ARKANSAS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioners, HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY and MICHAEL RAY ORNDORFF, by their attorneys, Donald R. Huffman, Marshall N. Carlisle, Matt Horan and Priscilla Karen Pope, respectively, ask leave to file the attached petitions for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioners have previously been granted leave to so proceed in both the Circuit Court of Benton County, Arkansas, and the Supreme Court of Arkansas. Petitioners' Affidavits in support of their motion are attached hereto.

HOYT FRANKLIN CLINES, Petitioner

By D. R. Huffman

Donald R. Huffman, Public Defender
Benton County Courthouse
Bentonville, AR 72712

DARRYL V. RICHLEY, Petitioner

By Matt Horan

Matt Horan
P. O. Box 539
Fayetteville, AR 72701

JAMES WILLIAM HOLMES, Petitioner

By Marshall N. Carlisle

Marshall N. Carlisle
16 East Spring Street
Fayetteville, AR 72701

MICHAEL RAY ORNDORFF, Petitioner

Priscilla Karen Pope

Priscilla Karen Pope
P. O. Box 4246
Fayetteville, AR 72701

RECEIVED
DEC 2 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-5849

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM,

HOYT FRANKLIN CLINES
Petitioner

vs.

STATE OF ARKANSAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

AFFIDAVIT TO PROCEED
IN FORMA PAUPERIS

I, Hoyt Franklin Clines, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? YES_____ NO ✓

a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

Nov. 80 $500.00 per month.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self-employment?
YES____ NO ✓

b. Rent payments, interest of dividends?
YES____ NO ✓

c. Pensions, annuities, or life insurance payments?
YES____ NO ✓

d. Gifts or inheritances?
YES____ NO ✓

e. Any other sources?
YES ✓ NO____

If the answer to any of the above above is "yes," describe each source of mney and state the amount received from each during the past twelve months.

Money from family for Personal needs.

3. Do you own cash, or do you have money in a checking or savings acount? (Include any funds in prison accounts).

YES____ NO ✓

If the answer is "yes," state the total value of the items owned.

_____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES____ NO ✓

If the answer is "yes," describe the property and state its approximate value.

_____

_____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute towards their support.

_____

_____

_____

_____

_____

DECLARATION

I, Hoyt Franklin Clines #887 declare under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on Oct. 20, 1983.

Hoyt Clines #887

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ .03 on account to his credit at the Ouachita Unit of the Arkansas Department of Correction where he is confined. I further certify that petitioner likewise has the following securities to his credit according to institution records.

_____

_____

_____

_____

Ark. Dept. of Correction
Unit Store Supv.

AUTHORIZED OFFICER OF THE DEPARTMENT OF CORRECTION.

STATE OF ARKANSAS)
COUNTY OF Lincoln)

SUBSCRIBED AND SWORN to before me this 27 day of October, 1983.

Jacki D. Sanders
NOTARY PUBLIC

My Commission Expires:

(Seal)

10/20/89

RECEIVED
DEC 2 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-5849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

JAMES WILLIAM HOLMES

Petitioner

vs.

STATE OF ARKANSAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

AFFIDAVIT TO PROCEED
IN FORMA PAUPERIS

I, James William Holmes, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? YES____ NO X

a. If the answer is "yes", state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is "no", state the date of last employment and the amount of salary and wagers per month which you received.

1974-1976 Moores Tool Company in Springdale, Arkansas $650 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self-employment?

YES_____ NO X

b. Rent payments, interest of dividends?

YES_____ NO X

c. Pensions, annuities, or life insurance payments?

YES_____ NO X

d. Gifts or inheritances?

YES_____ NO X

d. Any other sources?

YES_____ NO X

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts).

YES X NO_____

If the answer is "yes," state the total value of the items owned.

$37.30 thirty seven dollars and thirty cents

_____

_____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES_____ NO X

If the answer is "yes," described the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute towards their support.

None.

DECLARATION

I, James William Holmes, declare under the penalty of perjury, that the foregoing is true and correct to the best of my knowled and belief.

Executed on the 14th day of November, 1983.

James William Holmes
JAMES WILLIAM HOLMES

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ 37.30 on account to his credit at the Cummins Unit of the Arkansas Department of Correction where he is confined. I further certify that the petitioner likewise has the following securities to his credit according to institution records.

AUTHORIZED OFFICER OF THE DEPARTMENT OF CORRECTION

STATE OF ARKANSAS

COUNTY OF Lincoln

SUBSCRIBED AND SWORN to before me this 19 day of November, 1983.

Jackie D. Sanders
NOTARY PUBLIC

My Commission Expires:

(Seal)

10-20-89

RECEIVED
DEC 2 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-5849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

DARRYL RICHLEY,
Petitioner

vs.

STATE OF ARKANSAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

AFFIDAVIT TO PROCEED
IN FORMA PAUPERIS

I, Darryl Richley, delcares that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? YES_____ NO No

   a. If the answer is "yes", state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is "no", state the date of last employment and the amount of salary and wages per month which you received.

   October 1980 $7.25 per hour
   $1160.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession, or form of self-employment?

   YES_____ NO No

b. Rent payments, interest of dividends?

YES _____ NO No

c. Pensions, annuities, or life insurance?

YES _____ NO No

d. Gifts or inheritances?

YES _____ NO No

e. Any other sources?

YES _____ NO No

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts).

YES Yes NO _____

If the answer is "yes", state the total value of the items owned.

$41.65 (funds in Prison account)

_____

_____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES _____ NO No

If the answer is "yes", describe the property and state its approximate value.

_____

_____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute towards their support.

_____

_____

_____

_____

_____

DECLARATION

I, Darryl Richley, declare under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on the 22 day of November, 1983.

Darryl Richley
Darryl Richley

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $ 64.65 on account to his credit at the Cummins Unit of the Arkansas Department of Correction where he is confined. I further certify that the Petitioner likewise has the following securities to his credit according to institution records.

_____

_____

_____

_____

_____

AUTHORIZED OFFICER OF THE DEPARTMENT OF CORRECTION.

STATE OF ARKANSAS)
)ss
County of Lincoln)

Subscribed and sworn to before me, a Notary Public, this 22 day of Nov., 1983.

My Commission Expires:
12/15/89

Notary Public

RECEIVED
DEC 2 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-5849

IN THE SUPREME COURT OF THE UNITED STATES
October Term

MICHAEL R. ORNDORFF, SK 889, Petitioner

vs.

STATE OF ARKANSAS, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

AFFIDAVIT TO PROCEED IN FORMA PAUPERIS

I, Michael R. Orndorff, SK 889, declare that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? YES_____ NO X

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

1980

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self-employment?

YES_____ NO X

b. Rent payments, interest or dividends?

YES_____ NO X

c. Pensions, annuities, or life insurance payments?

YES_____ NO X

d. Gifts or inheritances?

YES_____ NO X

e. Any other sources?

YES_____ NO X

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts).

YES_____ NO X

If the answer is "yes", state the total value of the items owned.

_____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES _____ NO X

If the answer is "yes", describe the property and state its approximate value.

_____

_____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute towards their support.

_____

0

_____

_____

DECLARATION

I, Michael R. Orndorff, SK 889, declare under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED on this 17 day of November, 1983

Michael R. Orndorff

Michael R. Orndorff, SK 889

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ 0 on account to his credit at the Cummins Unit of the Arkansas Department of Correction where he is confined. I further certify that petitioner likewise has the following securities to his credit according to institution records.

_____

_____

_____

_____

Authorized Officer of the
Arkansas Department of Correction

STATE OF ARKANSAS)
) ss.
COUNTY OF LINCOLN)

SUBSCRIBED AND SWORN to before me this 17 day of November, 1983

Notary Public

My commission expires:

12/15/89

Supreme Court, U.S.
FILED
JAN 26 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 83-5849

SCOTT FRANKLIN CLINES,
JAMES WILLIAM HOLMES,
DARRYL V. RICHLEY and
MICHAEL RAY ORNDORFF — PETITIONERS

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

JOHN STEVEN CLARK
Attorney General

By: ALICE ANN BURNS
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

No. 83-5849

HOYT FRANKLIN CLINES,
JAMES WILLIAM HOLMES,
DARRYL V. RICHLEY and
MICHAEL RAY ORNDORFF — PETITIONERS

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

JOHN STEVEN CLARK
Attorney General

By: ALICE ANN BURNS
Deputy Attorney General
Justice Building
Little Rock, Arkansas
[501] 371-2007

Attorneys for Respondent

QUESTIONS PRESENTED

I.

WHETHER THE DENIAL OF SEVERANCE VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS?

II.

WHETHER THE ARKANSAS CAPITAL FELONY MURDER STATUTE AS APPLIED TO PETITIONERS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

III.

WHETHER THE USE OF A DEATH QUALIFIED JURY TO DECIDE THE GUILT AND PUNISHMENT OF PETITIONERS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS?

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OPINION BELOW

The opinion of the Arkansas Supreme Court affirming petitioners' convictions for capital felony murder and death sentences is reported at 280 Ark. 77 (Adv. Sheets, July 5, 1983). A copy of the opinion is included in petitioners' appendix, but respondent has submitted an additional copy of the opinion in its appendix because petitioners' copy is incomplete. Thus all references in this response are tc respondent's appendix unless otherwise noted.

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and statutes are found in petitioners' brief at page 3.

STATEMENT OF THE CASE

Respondent concurs in petitioners' Statement of the Case but also refers the Court to the opinion of the Arkansas Supreme Court set forth in respondent's appendix.

REASONS FOR DENYING THE WRIT

I.

THE DENIAL OF SEVERANCE DID NOT VIOLATE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

A.

PETITIONERS WERE NOT ENTITLED TO SEVERANCE AS A MATTER OF LAW.

Petitioners claim they were entitled to severance as a matter of right because the State was seeking the death penalty against them. Petitioners are remiss in their argument, however. Previously in Arkansas, when the State sought the death penalty, severance of defendants was mandatory. Vault v. Adkisson, 254 Ark. 75, 491 S.W.2d 609 (1973). As acknowledged by petitioners, Ark. R. Crim. P. 22.3, Ark. Stat. Ann. Vol. 4A (Repl. 1977) provides that severance of defendants in all cases lies within the sound discretion of the trial court. Petitioners' brief at p. 7. Rule 22.3(a) was promulgated in light of Bruton v. United States, 391 U.S. 123 (1968). Whether to grant severance is a matter lying within the sound discretion of the trial court and that ruling will not be reversed absent an abuse of that discretion. Hallman v. State, 264 Ark. 583, 575 S.W.2d 688 (1977); Legg v. State, 262 Ark. 583, 559 S.W.2d 22 (1979).

Strong public policy favors joint trial of all defendants where they are charged in a single indictment, are alleged to have participated in the same act or transactions, and where charges may be proved by the same evidence, although each defendant need not have participated in every act. United States v. Heck, 499 F.2d 778 (9th Cir. 1974); United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976); United States v. McPartlin, 595 F.2d 132 (7th Cir. 1979). Fed. R. Crim. P. 8(b); 13, 14. Severance is not required merely because evidence may be more damaging against one defendant. United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980). To establish prejudice, defendant must show more than that he had a better chance for acquittal and, if he claims that a separate trial would have permitted him to call as a witness his co-defendant, he must establish

that the co-defendant would testify and that testimony would be exculpatory. The jury must further be able to individualize the evidence against each defendant and thereby reach a fair determination of guilt. United States v. Anthony, 565 F.2d 533 (8th Cir. 1977) cert. denied, 434 U.S. 1079; United States v. Mayo, 646 F.2d 369 (9th Cir. 1981), cert denied, Dondrich v. United States, 102 S.Ct. 979; United States v. Phillips, 664 F. 2d 971 (5th Cir. 1981).

Respondent thus concludes petitioners are remiss in their argument that they were entitled to severance as a matter of right as the great weight of authority so indicates.

Finally, petitioners' argument that the General Assembly impermissibly delegated law making authority to the Arkansas Supreme Court too must also fail. The Arkansas Supreme Court rejected a similar contention in Jennings v. State, 276 Ark. 217, 218, 633 S.W.2d 373 (1982). The Court held that Ark. Stat. Ann. §§ 22-242 (Supp. 1980), the enabling provision, [Petitioners' Appendix D] "'merely recognizes and is harmonious with the Court's inherent powers rather than conferring an express power."' citing Miller v. State, 262 Ark. 223, 225, 555 S.W.2d 563 (1977). In Miller, it was noted that in Sibbach v. Wilson, 312 U.S. 1 (1924), this Court held that "the legislature's power to regulate practice and procedure may be exercised by granting courts the authority to establish rules not inconsistent with other statutes or the United States Constitution." Miller v. State, 262 Ark. at 225. Accordingly, petitioners' due process rights were not violated.

B.

NO PREJUDICIAL OUT-OF-COURT STATEMENTS WERE ADMITTED AT TRIAL, NOR WAS EXCULPATORY EVIDENCE EXCLUDED.

As discussed in Part A, supra, petitioners were not entitled to severance as a matter of right. Respondent likewise submits the trial court did not abuse its discretion in denying severance of defendants at trial.

Petitioners rely on Hallman & Martin v. State, 264 Ark. 900, 575 S.W.2d 688 (1978), but respondent contends the

"protective circumstances" considered there are not a mandatory prerequisite to a joint trial.

In the opinion below, the Arkansas Supreme Court considered the facts, supported by the record and concluded that (1) the petitioners' defenses were not antagonistic and that (2) all four petitioners planned and executed the robbery, expressly deliberating on murder as a possible consequence. A.9-10. The court further concluded that this case was factually distinguishable from McDaniel and Gookin v. State, 278 Ark. 631, 648 S.W.2d 57 (1983). Nor did Enmund v. Florida, ____U.S.____, 102 S.Ct. _____, 73 L.Ed.2d 1140 (1982) compel the conclusion that imposition of the death penalty was cruel and unusual punishment under the circumstances, since the blame for the death of the murder victim rested with near equality on all petitioners. A.6-8.

Thus, petitioners present virtually the same argument herein as was presented to the court below on appeal and there rejected. Although apparently contending that the decision of the court below is inconsistent with prior state law and with this Court decision in Enmund, petitioners' argument is not meritorious. There being no inconsistency in the holding below in the instant case with prior decisions, review by this Court is not necessary. Rule 17(b)(c), Rules of the United States Supreme Court.

C.

PETITIONERS WERE NOT DENIED DUE PROCESS OR EQUAL PROTECTION BECAUSE THEY WERE LIMITED TO TWELVE PEREMPTORY CHALLENGES.

In concluding that no error was committed in limiting the petitioners to twelve peremptory challanges pursuant to Ark. Stat. Ann. § 43-1922 (Supp. 1981), A.22, the Arkansas Supreme Court noted this Court's holding that there is no absolute right to peremptory challenges under the Constitution, citing Stilson v. United States, 250 U.S. 583 (1919). There, the Court found that the Constitution of the United States does not require the granting of peremptory challenges nor does it designate the number to be allowed. The Supreme Court concluded that peremptory challenges are privileges granted by

statute and that requiring the parties defendant to be treated as a single party for the purpose of peremptory challenges is not improper. See also, Schaefer v. United States, 251 U.S. 466 (1920); Holmes v. United States, 134 F.2d 125, 129 (8th Cir. 1943); and State v. Persinger, 382 P.2d 497, 500 (Wash. Sup. Ct. 1963), appeal dismissed, 376 U.S. 187. Accord, Hayes v. Missouri, 120 U.S. 68 (1886).

The petitioners assert that the peremptory challenge is a fundamental right and any state action which restricts or inhibits the exercise of that right must be closely scrutinized in accordance with Shapiro v. Thompson, 394 U.S. 618 (1964). This contention was specifically rejected in Martin v. State, 317 N.E.2d 430, 431-432 (Ind. Sup. Ct. 1974), cert. denied, 420 U.S. 911.

The fact that the present case is a capital case is insufficient to remove it from the approved statutory method of apportioning peremptory challenges. Consider People v. King, 49 Cal. Rptr. 562, 568-569 (1966), cert. denied, 385 U.S. 923, a capital case in which co-defendants were required to jointly exercise challenges. In People v. King, supra, the court held that peremptory challenges are a privilege, not a right, which must be exercised within limits imposed by the legislature. See also, State v. Rivenburgh, 355 P.2d 689 (Utah 1960), cert. denied, 368 U.S. 922, a capital case wherein a similar conclusion was reached.

The equal protection and due process arguments advanced by petitioners are not unique to capital cases, but are equally applicable any time co-defendants are required to jointly exercise peremptory challenges. Such arguments have been routinely rejected by the courts. Consider, State v. Rivenburgh, supra (Utah); Martin v. State, supra (Ind.); Sitarski v. New York, 358 F.Supp. 817 (W.D.N.Y. 1973); United States v. Stidham, 459 F.2d 297 (10th Cir. 1972); cert. denied, 409 U.S. 868; State v. Allen, 562 P.2d 632 (Wash. 1977). The "class" herein is certainly not suspect. Martin v. Indiana, supra, at 317 N.E.2d 431.

Finally, the ruling of the court below is consistent with its previous decisions upholding the method of apportioning peremptory challenges between co-defendants pursuant to Ark. Stat. Ann. § 43-1929 (Repl. 1977). A.22 Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1980); Lewis v. State, 220 Ark. 914, 251 S.W.2d 490 (1952); Hearne v. State, 121 Ark. 460, 181 S.W.2d 291 (1921).

Petitioners's constitutional rights were not abridged by being limited to twelve peremptory challenges and this Court should decline to review the issue.

D.

DENIAL OF SEVERANCE DID NOT CAUSE PETITIONERS TO BE SENTENCED JOINTLY, AND THUS DUE PROCESS AND THE PROHIBITION AGAINST ARBITRARY DEATH SENTENCES CONTAINED IN THE FOURTEENTH AND EIGHTH AMENDMENTS, WERE NOT VIOLATED.

As indicated in Subpart B, supra, the Arkansas Supreme Court considered the record of this appeal in light of this Court's holding in Enmund v. Florida, ____U.S.____, 102 S.Ct. _____, 73 L.Ed.2d 1140 (1982), considered the culpability of each petitioner and concluded the blame for the death of the murder victim was shared with near equality by all. A.8.

II.

THE ARKANSAS CAPITAL FELONY MURDER STATUTE IS CONSTITUTIONAL.

Petitioners first contend that Ark. Stat. Ann. § 41-1501 (Repl. 1977), this State's capital murder statute, is unconstitutional because it does not require the jury to consider the culpability of each individual defendant. (Petitioner's Appendix F-1) The Arkansas Supreme Court passed on the merits of this issue below, noting that it could decline to do so because petitioners did not object at trial to the capital murder instructions nor tender an instruction consistent with their view of the law, citing Schwindling v. State, 269 Ark. 388, 602 S.W.2d 639 (1980). The discussion of the court below finding and assessing the criminal acts and intent of each petitioner has previously been discussed in I, Subpart B, supra. See A.69.

In Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), the Supreme Court recognized Arkansas as being

a state whose capital murder statute "require[d] some culpable mental state with respect to homicide as a prerequisite to conviction for which the death penalty is authorized." 73 L.Ed.2d at 1147.

Arkansas has held that the quoted language is in the nature of a culpable mental state akin to intent. State v. Vowell, 276 Ark. 258, 260, 634 S.W.2d 118 (1982); Nolen v. State, 278 Ark. 17, 643 S.W.2d 257 (1982).

Moreover, as indicated in the Arkansas Supreme Court's opinion, the Arkansas capital murder statute does not mandatorily result in the imposition of the death penalty upon conviction. A.6.

It has previously been held that the capital murder statute does not require the mandatory imposition of the death penalty, recognizing the jury's flexibility in sentencing and the trial court's authority to modify the sentence imposed. Ruiz & Van Denton v. State, 273 Ark. 94, 104-106, 617 S.W.2d 6 (1981); Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977). Likewise, this Court has addressed the issue of the prosecutor's authority to waive the death penalty and found such to be valid as long as exercise of that authority is not based upon an unjustifiable standard such as race, religion or other arbitrary classification. Miller v. State, 269 Ark. 341, 352, 605 S.W.2d 430 (1980); Ruiz & Denton v. State, 275 Ark. 410, 412-414, 630 S.W.2d 44 (1982); Hill v. State, 278 Ark. 194, 197-198, 644 S.W. 2d 282 (1983). This position is consistent with this Court's position in Bordenkircher v. Hayes, 434 U.S. 359 (1978).

As noted by the opinion below, the petitioners' contention that the equal protection clause is violated because there are more men than women on death row in Arkansas was raised for the first time on appeal and rejected as conclusory. A.5.

In Cromwell v. State, 269 Ark. 104, 106-107, 598 S.W.2d 733 (1980), it was held that Arkansas' capital murder statute was not impermissibly vague because it employs language prohibiting the death of another "under circumstances manifesting an extreme

indifference to the value of human life," citing Martin v. State, 261 Ark. 80, 547 S.W.2d 81 (1977) where such language was clearly upheld. See also, Ruiz & Van Denton v. State, 273 Ark. 94, 617 S.W.2d 6 (1981).

Finally, the result reached below is not inconsistent with the Arkansas Supreme Court's previous holding in Henry v. State, 278 Ark. 478, 647 S.W.2d 419 (1983). In Henry, the evidence clearly indicated that Henry's co-defendant Britton fired the fatal shots that killed the victim. 278 Ark. at 485. In the instant case, the court below correctly determined that responsibility for the murder was shared by all petitioners. Thus, these holdings are not inconsistent.

III.

PETITIONERS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE USE OF A DEATH QUALIFIED JURY.

Respondent acknowledges the recent decision of Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark. 1983), which held that the Arkansas jury selection process in capital murder cases denied the accused trial by a jury representative of a cross section of the community and created juries that were conviction prone. Compare, Witherspoon v. Illinois, 391 U.S. 510 (1968). This position was taken in contravention of decisions by the Arkansas Supreme Court repeatedly rejecting similar contentions that such juries are conviction prone and not representative of a fair cross section of the community. Coble v. State, 274 Ark. 134, 140, 624 S.W.2d 421 (1981), cert. denied, ____ U.S.____; Miller v. State, 269 Ark. 341, 351, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035; Giles v. State, 261 Ark. 413, 426-427, 549 S.W.2d 479 (1977), cert. denied, 433 U.S. 894. The position of the court below on this issue was recently reaffirmed in Rector v. State, 280 Ark. 385 (Adv. Sheets, Oct. 17, 1983) where the position taken by the district court was outright rejected. Respondent notes that the Grigsby decision has been appealed to the Court of Appeals for the Eighth Circuit but has yet to be decided. Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980)

Thus, respondent asserts the issue has been prematurely presented for this Court's review since the issue may be resolved in a lower court.

On May 8, 1981, the trial court filed an order which summarized the action taken at an omnibus hearing. (T.4346) In such order, the court noted that any motions and supporting briefs challenging the death qualification of jurors should be filed withn 20 days of receipt of the order. On June 1, 1981, Richley and Clines filed motions challenging the death qualification of jurors. (T.73,75,85) Approximately 120 days beyond the deadline imposed by the court, Orndorff sought to join in the motion previously filed by Clines by submitting a letter to the trial court. (T.139) Respondent therefore contends that Orndorff and Holmes lack standing to contest the constitutionality of death qualifying a jury.

Moreover, although petitioners couch their argument in terms of several written studies which have considered that issue, no evidence was presented to the trial court in support of petitioners' motions below. It has previously been held that the death qualified jury issue may not be considered unless properly raised in state trial court. Hulsey v. Sargent, 550 F.Supp. 179 (E.D.Ark. 1981).

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Respondent respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioners relief in their direct appeal. Therefore for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice Ann Burns, Deputy Attorney General, do hereby certify that a copy of the above and foregoing pleading has been served on petitioners by placing a copy of same in the United States Mail, postage prepaid, this 23rd day of January, 1984, addressed to the following attorneys of record:

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RESPONDENT'S
APPENDIX

Hoyt Franklin CLINES, James William HOLMES, Darryl V. RICHLEY and Michael Ray ORNDORFF
v. STATE of Arkansas

CR 82-54

Supreme Court of Arkansas
Opinion delivered July 5, 1983

1. CRIMINAL LAW — CAPITAL FELONY MURDER DEFINED. — Capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. [Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977).]
2. CONSTITUTIONAL LAW — CAPITAL MURDER STATUTE NOT VAGUE. — The Arkansas capital murder statute is not vague; in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses.
3. APPEAL & ERROR — ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL WILL NOT BE CONSIDERED. — Where an argument is raised for the first time on appeal, it will not be considered.
4. JURY — JURY NOT BOUND TO RETURN DEATH SENTENCE. — Whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. [Ark. Stat. Ann. § 41-1302 (2) (c).]
5. CRIMINAL LAW — CAPITAL MURDER AND FIRST DEGREE MURDER STATUTES OVERLAP — JURY FREE TO CONSIDER BOTH. — Because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree.
6. CONSTITUTIONAL LAW — PROSECUTORIAL DISCRETION IN SEEKING DEATH PENALTY NOT ARBITRARY AND CAPRICIOUS. — Imposition of the death penalty is not arbitrary and capricious just because the prosecuting attorney is given discretionary power to waive the death penalty.
7. CONSTITUTIONAL LAW — DEATH PENALTY — WHEN IT IS CRUEL AND UNUSUAL PUNISHMENT. — Although death is cruel and

unusual punishment for one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence, and since the murder was plainly contemplated by the appellants, the blame for the murder rests with near equality on all of the appellants.

8. CRIMINAL PROCEDURE — SAFEGUARDS AGAINST ARBITRARY IMPOSITION OF THE DEATH PENALTY. — There are added safeguards in our system against the arbitrary imposition of the death penalty: the power of the trial court to reduce a death sentence to life imprisonment, and comparative review of every death case by the Supreme Court which has modified death sentences where they were imposed capriciously, where the culpability of co-felons was disproportionate or where death was unduly harsh under the circumstances.

9. CRIMINAL PROCEDURE — SEVERANCE IN CAPITAL CASES — DISCRETIONARY WITH TRIAL COURT. — Although defendants in capital cases were previously entitled to severance as a matter of right pursuant to Ark. Stat. Ann. § 43-1802 (Repl. 1977), A.R.Cr.P. Rule 22.3 superseded § 43-1802 and gives discretion to the trial court to try the defendants jointly in capital cases.

10. CRIMINAL PROCEDURE — SEVERANCE DISCRETIONARY WITH TRIAL COURT — CAREFULLY SCRUTINIZED. — Although severance of the defendants rests within the sound discretion of the trial court and such discretion is broad, it is to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial.

11. CRIMINAL PROCEDURE — NO ABUSE OF DISCRETION TO REFUSE SEVERANCE. — The trial court did not abuse its discretion in refusing to grant separate trials where the defenses were not utterly antagonistic, the culpability was not distinctly disproportionate and nothing suggests that substantial injustice would result if these appellants were tried jointly.

12. CONSTITUTIONAL LAW — DEATH QUALIFIED JURY NOT UNCONSTITUTIONAL. — Death qualified juries are not unconstitutional.

13. JURY — SELECTION — TRIAL COURT IN BETTER POSITION TO EVALUATE ATTITUDE OF VENIREMEN. — Where the veniremen's answers were tentative or equivocal, the trial court is in a better position than the appellate court to gauge the attitude

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of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law.

14. CRIMINAL PROCEDURE — JOINT TRIAL — EACH DEFENDANT IS NOT ENTITLED TO FULL ALLOTMENT OF PEREMPTORY CHALLENGES. — Where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all.
15. JURY — NO RIGHT TO PEREMPTORY CHALLENGES UNDER THE CONSTITUTION. — No absolute right to peremptory challenges exists under the constitution.
16. TRIAL — RECESSES AND SEQUESTRATION NOT AMENABLE TO INFLEXIBLE RULES. — Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar.
17. TRIAL — FIVE DAY RECESS NOT AN ABUSE OF DISCRETION. — When the trial court ordered a five day recess between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council, the trial judge did not abuse his discretion; the trial was commenced well in advance of the meeting, but moved at a slower pace than expected.
18. APPEAL & ERROR — POINT NOT CONSIDERED ON APPEAL IF PROPER OBJECTION NOT MADE BELOW. — A point will not be considered on appeal if a proper objection was not made below.
19. EVIDENCE — NO ERROR FOR TRIAL COURT TO ADMIT STATEMENT OF WITNESS. — The trial court did not err in admitting into evidence a statement by a witness that one of the defendants told him that he had been involved in "stealing and robbing," since the statement was admitted with an admonition to the jury in accordance with the purposes of Ark. R. Evid. 404 (b).
20. EVIDENCE — NO CLEAR ERROR SHOWN BY COURT ALLOWING QUESTION TO WITNESS ABOUT PRIOR ROBBERY. — The trial court was not clearly wrong in allowing one defense attorney to ask an alibi witness if her husband was facing charges for robbery committed the night before the murder and later allowing the state to go into greater detail when the husband took the stand; whether the questions were asked to discredit the witnesses or may have been intended for the purpose of proving identity, opportunity, intent, preparation or absence of mistake, the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value and

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the prejudicial aspect is not so obvious that the appellate court can say the trial court was clearly wrong.

21. CRIMINAL PROCEDURE — ACCOMPLICE TESTIMONY AS TO COMMISSION OF PRIOR VIOLENT CRIMES IN SENTENCING PHASE OF CAPITAL CASE. — Although Ark. Stat. Ann. § 43-2116 provides that a *conviction* cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence, that is not the rule when the state is proving aggravating circumstances during the sentencing phase of a capital murder case since the state is trying to prove that a crime of violence was *committed*.

22. CRIMINAL LAW — AGGRAVATING AND MITIGATING CIRCUMSTANCES — STANDARD OF PROOF. — The same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime; if there is evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

23. TRIAL — OBJECTIONS MUST BE TIMELY — GRANT MISTRIAL ONLY IF TRIAL CANNOT FAIRLY CONTINUE. — Objections must be timely, and mistrials should be declared *only* when the trial court is certain the trial cannot, in fairness, continue.

24. APPEAL & ERROR — DOCUMENTS SHOULD BE ABSTRACTED. — Where an argument on appeal is based on a search warrant and affidavit, the rules require that they be properly abstracted.

Appeal from Benton Circuit Court; *William H. Enfield*, Judge; affirmed.

Marshall N. Carlisle; Donald R. Huffman, Public Defender; *Priscilla Karen Pope;* and *Thomas J. Tucker*, for appellants.

Steve Clark, Atty. Gen., by: *Dennis R. Molock* and *Alice Ann Burns*, Asst. Attys. Gen., for appellee.

STEELE HAYS, Justice. These four appellants were jointly tried and convicted of the January 8, 1981 capital murder of Don Lehman, a Rogers householder, and of the aggravated robbery of his wife and daughter. They were sentenced to death by electrocution on the capital murder charge and to life sentences on the two aggravated robbery

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charges. On appeal they allege a number of errors of law and procedure as grounds for reversal. Finding no error, we affirm the convictions and the sentences imposed.

I.

THE TRIAL COURT ERRED IN FINDING THE ARKANSAS CAPITAL MURDER STATUTE CONSTITUTIONAL.

Appellants make a four-fold attack on the constitutionality of the Arkansas felony murder statute, Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977), which provides that capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Appellants argue that the statute is vague and overbroad; that it denies equal protection of the law inasmuch as there are currently twenty-three men, but no women, on death row; that the imposition of the death penalty is arbitrary and capricious because the prosecuting attorney is given discretionary power to waive the death penalty and because the jury must return a death verdict if they find aggravating circumstances outweigh mitigating circumstances; and finally that our statutory scheme does not require the jury to consider the culpability of each individual defendant.

The vagueness argument has been raised and answered more than once. In *Cromwell* v. *State*, 269 Ark. 104, 598 S.W.2d 733 (1980), we pointed out that in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses. (See *Cromwell* at p. 107).

The claim that the equal protection clause of the constitution is offended because men are given the death penalty disproportionately to women is raised initially on appeal and, beyond that, is supported by argument alone.

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We disagree that juries are bound under our statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances. We have pointed out in several cases that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. (See *Williams* v. *State*, 274 Ark. 9, 621 S.W.2d 686 [1981] and Ark. Stat. Ann. § 41-1302 [2] [c]). Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. *Wilson* v. *State*, 271 Ark. 682, 611 S.W.2d 739 (1981). This jury had that option.

The argument that prosecutorial discretion in seeking the death penalty is arbitrary and capricious has been dealt with by the Supreme Court of the United States (*Bordenkircher* v. *Hayes*, 434 U.S. 359 [1978]); and by us (*Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 [1980]). It needs no further review.

The claim that our statutory scheme does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, might be disposed of on procedural grounds, as the argument was not clearly raised below, i.e. we find no objection to the capital murder instructions, nor did the appellants tender to the trial court an instruction consistent with their view of the law. *Schwindling* v. *State*, 269 Ark. 388, 602 S.W.2d 639 (1980). However, we choose to consider the merits of the argument.

Appellants cite *Enmund* v. *Florida*, ___ U.S. ___, ___ S. Ct. ___, 73 L. Ed. 2d 1140 (1982). There, the Supreme Court held that death was a cruel and unusual punishment for one who had participated in a robbery during which murders were committed, but was not present at the killings and did not intend that the victims be killed. The court noted that the record supported no more than an inference that Enmund, the petitioner, was the person waiting in a car near

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the scene of a robbery. Two others had gone to the rear of a nearby farmhouse and, on a pretext of having car trouble, coaxed the victim outside to rob him. When the victim called for help his wife came out and shot one of the robbers. The two victims were killed in a gun battle and the robbers fled with their money to a waiting car.

Relying on the Eighth Amendment, the court held that one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, is not subject to the death penalty. A Florida jury had found Enmund and a co-defendant guilty and recommended the death penalty for both defendants, which the trial court imposed. Acknowledging the absence of any direct evidence that Enmund was present at the killings, the Supreme Court of Florida affirmed, explaining that the interaction of the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons. As it did with the death penalty for rape (see *Coker* v. *Georgia*, 433 U.S. 584 [1977]), the court reasoned that an overwhelming number of states and of American juries would repudiate the death penalty for crimes such as Enmund's.

Significant comments are in the opinion, first, that there was no evidence that Enmund had any intention of participating in, or facilitating, a murder and, second, the court emphasized that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Here, a number of distinguishing factors immediately appear. At about 9:45 p.m., after he and his family had retired for the evening, Don Lehman answered a knock at his front door. He asked who was there and someone answered "David." His daughter, Vickie, also responding to the knocking, said as her father unlocked the door the four appellants, masked and armed, burst into the room with such force that her father was knocked backward off his feet and the doorknob of the front door was jammed through a closet door behind. Two or three of the appellants struggled with her father toward the

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bedroom, where Mr. Lehman was wrestled onto the bed and a fatal shot to the head and one to the abdomen were delivered.

There was direct evidence from more than one source that appellants had discussed among themselves the necessity of murder if they met resistance; at least two of the appellants were armed with pistols, perhaps three of them, and the fourth with a lethal weapon fashioned from a metal chain. All four wore ski masks and all four burst into the Lehman home when the latch was opened. The proceeds, some $1,200, were presumably divided to the appellants' liking. It must be noted, too, that Lehman was given no opportunity to yield, he was immediately attacked by appellants, sustaining blows to his head and face from the metal chain and a mortal wound to the chest before reaching the bedroom.

Although perhaps only two of the appellants were in the bedroom when Mr. Lehman was killed, it cannot be ignored that when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence. We think the likelihood of a homicide under the circumstances is so substantial as to bring this case clearly within the quoted exception of the *Enmund* decision, on those circumstances alone. Added to that is the evidence that murder was plainly contemplated by the appellants. We conclude the blame for Don Lehman's murder rests with near equality on all of the appellants.

As a final response to this phase of the argument, we point out that there are added safeguards in our system against the arbitrary imposition of the death penalty. In *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence

where it is imposed capriciously (see *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 [1981]), or where the culpability of co-felons is disproportionate (see *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 [1983]), or where death is unduly harsh under the circumstances (*Neal* v. *State*, 274 Ark. 217, 623 S.W.2d 191 [1981] and *Giles* v. *State*, 261 Ark. 413, 549 S.W.2d 479 [1977]).

We are not overlooking the suggestion that Michael Orndorff's participation in the crime was half-hearted; that he may have asked to be taken home as the appellants were leaving the Baker residence; and that after the shooting he disclaimed any wish to be involved in a murder. But the jury unanimously rejected as a mitigating factor that any appellant played a minor role. Too, Orndorff's request to be taken home may have been due to Steve Baker's having declined to go along, rather than because of any compunctions over the undertaking. And his belated comment that he didn't want to be a part of a murder must be judged from the standpoint that it came *after* the fact and against the uncontradicted proof that he burst into the Lehman home along with the others, masked and intent on robbing, killing, if need be, anyone who resisted. We need not repeat what we have already said about the shared culpability for Don Lehman's death under the circumstances of this case. To selectively exclude this appellant from the penalty imposed by the jury for conduct readily assumed by all of them would be to arbitrarily excuse him from the predictable consequences of his own actions, consequences which the proof showed he expressly recognized.

II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A SEPARATE TRIAL FOR EACH DEFENDANT.

Prior to the adoption of the Arkansas Rules of Criminal Procedure in 1976, defendants in capital cases were entitled to severance as a matter of right pursuant to Ark. Stat. Ann. § 43-1802 (Repl. 1977). However, A.R.Cr.P. Rule 22.3 superseded § 43-1802 and gives discretion to the trial court to try

the defendants jointly in capital cases. *Hallman and Martin v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

Appellants submit that our recent decision in *McDaniel and Gookin v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983), requires a reversal of this case, but the argument cannot be sustained. There are fundamental differences between the two cases and in *McDaniel* we did not disturb the rule that severance of defendants rests within the sound discretion of the trial court. We pointed out that such discretion is broad, though to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial. (See *McDaniel and Gookin v. State*, page 638). In *McDaniel*, the defenses of the defendants were utterly antagonistic, each defendant claiming the murder was committed unexpectedly by the other. No such similarity exists here. It is argued that the defenses in this case are antagonistic, but that claim cannot be supported. We find no effort among the defendants to point to another defendant as the murderer; the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred. These defenses are not in the least antagonistic in the same sense as in *McDaniel*.

The final and essential difference is that the *McDaniel* case had the added element that where culpability was distinctly disproportionate, the jury was admittedly unable to decide which of the two defendants committed a heinous act, resulting in two defendants being convicted of a capital crime for which only one may have been guilty. Whereas here, there is substantial evidence, indeed overwhelming evidence, that all four appellants planned and executed a robbery, expressly deliberating on murder as a possible consequence. Nothing in this record suggests that for these appellants to be tried jointly resulted in substantial injustice and we find no abuse of discretion in the trial court's refusal to grant separate trials.

III.

THE USE OF A DEATH QUALIFIED JURY IN THE INSTANT CASE DENIED THE APPEL-

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LANTS AN IMPARTIAL JURY ON THE ISSUES OF GUILT AND PUNISHMENT AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The gist of this argument is that when those members of a jury panel holding religious or conscientious scruples against capital punishment are eliminated, the cross-section of the population which remains is not impartial and unbiased on the issues of guilt and punishment. They are, it is urged, favorable to the prosecution and, hence, guilt prone. The argument is not new and needs no reiteration. It has been considered and rejected here as well as in the Supreme Court of the United States. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

IV.

THE JURY SELECTED IN THE INSTANT CASE WAS NOT SELECTED IN ACCORDANCE WITH THE STANDARD PRESCRIBED IN *WITHERSPOON* AND *HOBBS*.

The *Witherspoon* rule, as interpreted in *Hobbs* v. *State*, 273 Ark. 125, 617 S.W.2d 347 (1981) permits the exclusion of persons as prospective jurors *only* if they irrevocably oppose or favor the death penalty regardless of the evidence. Appellants insist that two of the veniremen, Mrs. Kaiser and Mrs. Dick, should not have been excused for cause because of their uncertainty as to capital punishment and Mr. Harley Wood, who showed some preference for it, should have been excused for cause.

We have examined the questions asked in voir dire and the responses given and, typically, no clear conclusion can be drawn. The answers are tentative or equivocal, and the trial court is in a better position than we are to gauge the attitude of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law. We cannot say his discretion was used wrongly in any instance complained of. *Hulsey* v.

State, 268 Ark. 312, 595 S.W.2d 934 (1980); *McCree* v. *State*, 266 Ark. 465, 585 S.W.2d 938 (1979).

V.

THE TRIAL COURT ERRED IN LIMITING THE APPELLANTS TO A TOTAL OF TWELVE PEREMPTORY CHALLENGES.

The trial court limited the four defendants to a total of twelve peremptory challenges, which they claim is error. We have held in three cases that where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all. *Williams* v. *State*, 267 Ark. 527, 593 S.W.2d 8 (1979); *Lewis* v. *State*, 220 Ark. 914, 251 S.W.2d 490 (1952); *Hearne* v. *State*, 121 Ark. 460, 181 S.W.2d 291 (1915).

No absolute right to peremptory challenges exists under the constitution, *see Stilson* v. *United States*, 250 U.S. 583 (1919), and we see no prejudice resulting from the position we have taken in the earlier decisions. The right to challenge a prospective juror on peremptory grounds may be exercised simply because counsel has reservations that certain groups might be skeptical of its theory of the case; it is a very general response and such criteria as occupation, education, age, residence, social background, sex, and even facial expression, may influence its use, depending on the nature of the case. But ordinarily these considerations are applicable to the defendants as a whole and not individually. Here, it appears the peremptory challenges were exercised collectively by the defense, as might be expected, and no argument is offered that for a specific reason one prospective juror was objectionable to one of the defendants, though not to the others. We adhere to our holding in *Williams* v. *State*, *supra*.

VI.

CALLING A FIVE DAY RECESS AT THE CLOSE OF TESTIMONY WAS AN ABUSE OF THE COURT'S DISCRETION.

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Appellants allege that it was an abuse of discretion for the trial court to order a five day recess as the trial was nearing a close. The recess occurred, evidently, between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council. The trial seems to have commenced well in advance of the meeting, but moved at a slower pace than expected. Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar. We see no reason why it would work to the appellants' greater prejudice to recess from Wednesday to Monday, than from Friday to Monday, as often occurs in trials. We find no abuse of discretion.

VII.

IT WAS ERROR FOR THE JURY TO FIND THE AGGRAVATING CIRCUMSTANCE THAT, "IN THE COMMISSION OF THE CAPITAL MURDER, EACH OF THE APPELLANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO A PERSON OTHER THAN THE VICTIM."

Citing *Williams* v. *State*, 274 Ark. 9, 621 S.W.2d 686 (1981), appellants contend that because Vickie Lehman and Virginia Lehman were victims of the underlying felony of aggravated robbery to the capital murder of Don Lehman, the evidence will not warrant a finding as an aggravating circumstance that appellants knowingly created a great risk of death to a person other than the victim. Appellants assert that *Williams* v. *State* supports the argument, but fail to explain how. The holding there has no particular relevance to this case. Williams' death sentence was reduced because one of the aggravating circumstances found by the jury, commission of a prior felony, did not involve violence as required by Ark. Stat. Ann. § 41-1303 (Repl. 1977). The decision also holds that where a jury finds no mitigating circumstances and three aggravating circumstances, one of which is erroneous, we will not regard the error as harmless simply because two aggravating circumstances remain, as

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we are not in a position to speculate as to what a jury would do on a finding of two aggravating factors instead of three.

The appellee submits that this point was not preserved by an objection to the instructions or to the verdict forms. Without implying that the point is otherwise meritorious, we decline to consider it for the lack of proper objections.

VIII.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AND ACTS AGAINST APPELLANTS CLINES AND ORNDORFF.

Mrs. Tammy Baker was called by the state to prove that the appellants had been at her home the evening of the Lehman murder, drinking beer and playing cards with her husband, Steve Baker. She said when she answered the door the four appellants were there, that one was wearing a ski mask and stuck a gun in her face. She was ordered to "stick 'em up", before realizing that a joke was being played. The four stayed until about 9:30 p.m. and she overheard discussions involving the robbery of someone who lived nearby.

On cross-examination she was asked by counsel for one of the defendants, Clines, whether her husband was then facing charges of robbery committed the night before the Lehman crime. She said he was and was then asked if any of the appellants were involved and she said Orndorff and Clines were. Orndorff's objections to this line of questioning were overruled and when Steve Baker followed his wife to the stand the state was permitted to go into the incident in greater detail.

Appellants Clines and Orndorff complain that the admission of this evidence, as well as a statement by Billy Weaver that Darrell Richley told him he was the one who shot Don Lehman, that he had been involved in "stealing and robbing," violate the rule against admitting evidence of prior bad acts, citing *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). But the Weaver comment was admitted

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with an admonition to the jury in accordance with the purposes of Rule 404 (b), Uniform Rules of Evidence, and the Baker testimony has to be examined in light of the fact that it was Clines' lawyer who pointedly asked the questions that brought the evidence into the trial. Whether the object was to discredit Tammy and Steve Baker's testimony by showing that Baker was charged with similar conduct is speculation, but we are not persuaded that reversible error occurred. It is entirely possible that the evidence would have been received by the trial court under Rule 404 (b) had it been offered for the purpose of proving identity, opportunity, intent, preparation, or absence of mistake. Certainly the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value. The prejudicial aspect is not so obvious that we can say the court was clearly wrong.

IX.

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY, IN THE SENTENCING PHASE, TO FIND APPELLANTS CLINES AND ORNDORFF HAD "PREVIOUSLY COMMITTED ANOTHER FELONY, AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON" ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

After the appellants' guilt had been established and the penalty phase of the trial was in progress the state was permitted to prove one of the seven aggravating circumstances listed in Ark. Stat. Ann. § 41-1303 (Repl. 1977) by the testimony of Steve Baker that he, Clines and Orndorff had previously committed another felony by the use or threat of violence. Baker said the three of them robbed Barry Cobbs and Tim Pettyjohn at gunpoint on January 7, 1981.

Appellants charge that since Steve Baker was an accomplice in the alleged robbery the penalty procedure violated the rule incorporated in Ark. Stat. Ann. § 43-2116,

that a conviction cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence. As Steve Baker's testimony was not corroborated, appellants claim that error resulted. The argument cannot be sustained, if for no other reason than the fact that § 43-2116 deals with grounds for *conviction,* whereas § 41-1303 deals with proving that a crime of violence was previously *committed.* Beyond that, in *Miller* v. *State, supra,* we held that the same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. (*Miller* at p. 355). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

X.

THE TRIAL COURT ERRED IN ADMITTING THE TENNIS SHOES OF THE APPELLANT CLINES.

We need not delay unduly with the issue raised by this argument, as the admission of the evidence itself was of little or no consequence. An investigating officer testified that he took an impression of a foot print from a flower bed of the Lehman home; that there was a high degree of probability that it matched Hoyt Clines' tennis shoe, however, he said it was impossible to be absolutely certain. But Clines' presence at the scene in company with the other appellants was amply evidenced by other proof and no objection to this evidence was offered unti the trial, as required by A.R.Cr.P. Rule 16.2.

XI.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL FOR TESTIMONY CONCERNING IMPLICATING OUT-OF-COURT STATEMENTS OF A CO-DEFENDANT, DARRYL V. RICHLEY, REGARDING APPELLANT CLINES.

Freddie Baker was called by the state to prove that Darryl Richley came to his home a day or two after the crime

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involving the Lehman family to ask his help in selling the guns taken from the Lehman home. Richley, he said, talked about his part in the murder, and told him four of them went to the door with ski masks and "busted on in", that one of the four started whipping Lehman with a motor chain belt, who made a break for the bedroom "and the guy pulled his mask off and kept hitting him. He said he got on the bed and that [Richley] shot him and said the guy kept going for a gun above the bed and he said he put the gun up to his head and shot him." The questioning continued at length, with no other reference to the removal of a mask, and not until the state fully completed its interrogation was any objection made. At that point counsel for Hoyt Clines moved for a mistrial on the grounds that there was previous testimony that it was Clines who had removed his mask and hence Clines was deprived of his right to confront opposing witnesses. This argument lacks merit, as objections must be timely, *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981), and mistrials should be declared *only* when the trial court is certain the trial cannot, in fairness, continue. *Floyd* v. *State*, 278 Ark. 86, 643 S.W.2d 555 (1982).

XII.

THE EVIDENCE OBTAINED FROM THE SEARCH OF APPELLANT RICHLEY'S CAR AND APARTMENT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE AND THE CONSENT TO SEARCH GIVEN BY RICHLEY WAS NOT GIVEN VOLUNTARILY.

Appellant Richley urges that the affidavit for the search warrant was deficient in that no underlying circumstances for the affiant's conclusions were stated. He also argues that his consent was not voluntary. However, the search warrant and affidavit are not abstracted, as required by our rules, and the trial court found the appellant did give a lawful consent to the search. An independent determination of that issue has been made on review and we are satisfied the trial court's finding was entirely consistent with the evidence, particularly in view of Richley's testimony.

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Finally, under A.R.Cr.P. Rule 36.24, and our Rule 11 (f), we find the treatment of other objections of appellants which were overruled, as well as rulings adverse to appellants, do not constitute reversible error. On a comparative basis we are not disposed to say the death penalty in this case is so wantonly, arbitrarily or freakishly imposed, or so excessive in relation to the crime, that we are compelled to modify the verdicts. There was sufficient evidence to support the findings of aggravating circumstances which were not outweighed by mitigating circumstances. We are satisfied the jury's verdict was relatively free of passion or prejudice. Accordingly, the judgments and sentences are affirmed.

DUDLEY, J., concurs in part, dissents in part.

PURTLE, J., dissents.

ROBERT H. DUDLEY, Justice, concurring in part, dissenting in part. The State adduced overwhelming evidence that the four appellants were guilty of jointly committing a capital murder and two robberies. Their individual defenses were not mutually antagonistic. Although the charges were joined and the appellants were jointly tried, the appellants as well as the State were afforded a just and fair proceeding through the accusatorial phase of the bifurcated capital murder trial.

However, that holding does not mandate the conclusion that the due process protections were sufficiently afforded at the joint sentencing phase of the capital murder trial. The two phases of the bifurcated trial serve vastly different purposes. The essence of the accusatorial phase is the formal adversary presentation of evidence relative to guilt. The adversary concept places the State and the accused on an equal footing and so, in fairness to the State, joint trials are oftentimes required through this stage. Markedly different, the essence of the sentencing phase is the search for relevant information to choose which of the two penalties, life without parole or death, is appropriate for the person already found guilty. This second phase search for information is not based upon the same adversary concept. Our applicable statute provides that mitigating circumstances

may be presented regardless of their admissibility under the rules of evidence while aggravating circumstances may be presented only when they are admissible under the rules of evidence. Ark. Stat. Ann. § 41-1304 (4) (Repl. 1977). The underlying reason for this is that the penalty of death is qualitatively different from all other punishments.

When the death penalty is sought, justice demands individual, not joint, sentencing. It is for this same reason that mandatory death sentences for particular crimes have been declared unconstitutional. *Gregg* v. *Georgia*, 428 U.S. 153 (1976). It is only after a structured exercise of discretion which guarantees individualized sentencing that the death sentence may be imposed. *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). Accordingly, after a finding of guilt of capital murder, juries in this State may impose a sentence of death only after considering aggravating and mitigating circumstances. Ark. Stat. Ann. §§ 41-1301 & 1302 (Repl. 1977). Aggravating circumstances are principally related to the personal history of the individual defendant and not the nature of the crime committed. Ark. Stat. Ann. § 41-1303 (Repl. 1977). Mitigating circumstances are totally related to the personal background of the defendant. *Id.* Individualized sentencing requires structured detailed consideration of the personal history of the guilty person before the death sentence may be imposed. Any impediment to that individualized exercise of discretion is violative of the protection of due process.

The clear issue is whether the joint sentencing procedure used in this case afforded each appellant the structured and detailed consideration of his individual background which is required before the sentence of death may be imposed. Surely no one can doubt that when the jury was sent out of the courtroom to fix the punishment for four equally guilty persons at one sitting, that after fixing the penalty for the first three at death, there was a great reluctance to give the fourth a lesser sentence. Such reluctance alone might arbitrarily mandate a fourth death penalty for the particular crime regardless of the guilty person's personal history. This impediment to the in-

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dividual exercise of discretion violated due process and the prohibition against arbitrary death sentences.

Such a scenario may well have occurred in the case at bar. In the sentencing phase appellant Clines was shown to have pleaded guilty in 1978 to burglary, a non-violent crime. No other convictions or felonious actions were shown to have been committed by him during this stage of the trial. The only other proof of a prior bad action, for which there was no conviction, came during the accusatorial phase of the trial when an accomplice gave uncorroborated testimony on a collateral matter. Yet, he, took was given the death sentence.

For this reason I dissent from that part of the well written majority opinion which affirms the joint proceeding to fix the punishments at death. I concur in that part of the opinion affirming the life sentences for the aggravated robberies.

JOHN I. PURTLE, Justice, dissenting. I believe at least one of the appellants, Michael Orndorff, was prejudiced by the trial court's refusal to give him a separate trial. To grant him a separate trial would have in no way selectively excluded him from culpability in regard to the crime for which he was convicted. In fact it seems to me that holding him to trial with the actual murderers practically insured his conviction. Guilt by association is a common human error and in this case I have no doubt it played a big part in the minds of the jury who meted out identical convictions and uniform penalties to all four appellants.

When each of the appellants attempted to place himself outside the bedroom where decedent was shot the result was that each defendant put before the same jury a defense inconsistent with the other defendants' defenses.

The majority opinion seems to infer some type of guilt from some of the appellants' failure to testify. If the trial court did this we would vote unanimously to reverse and remand. The trial court should have granted a severance.

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A total of twelve peremptory challenges were allowed the four defendants. One of them did not get to exercise a single peremptory challenge. Had they been tried separately each would have been allowed twelve challenges. Therefore, these appellants were denied rights which are extended to others tried separately on identical charges. There is nothing to prevent a trial judge from allowing more than twelve peremptory challenges if fairness and impartiality demand it.

Furthermore, it was clearly prejudicial to allow evidence of crimes for which the appellants had not been convicted even though this was during the sentencing phase of the bifurcated trial. What happened to the old law that held every individual is presumed innocent? Soon it will be legal for the state to charge an accused of spurious crimes in order to help secure a conviction. For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase.

I am still of the opinion that a death qualified jury is not comprised of a cross-section of the population as required by the Constitutions of Arkansas and the United States. It appears to me that there is a misunderstanding of the *Witherspoon* doctrine when prospective jurors are excluded because of religious or moral scruples against the death penalty. Perhaps some member or members of this very court have religious or moral scruples against the death sentence, yet we affirm such sentences if we find no reversible error. One who does not believe in the death sentence may honestly and conscientiously vote for such a sentence in upholding the law. For these reasons I must dissent to the majority opinion.

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43-1922. Peremptory challenges for defendant. -- The defendant shall be entitled to twelve [12] peremptory challenges in prosecutions for offenses punishable by death or life imprsonment, to eight [8] peremptory challenges in all other prosecutions for felony, and to three [3] peremptory challenges in prosecutions for misdemeanor[s]. [Init.Meas.1936, No. 3, § 18, Acts 1937, p. 1384; Pope's Dig., § 3998.]

43-1929. Challenges by several defendants -- When several defendants are tried together, the challenge of any one of the defendants shall be the challenge of all. [Crim. Code, §200; C. & M Dig., § 3169; Pope's Dig., § 4005.]